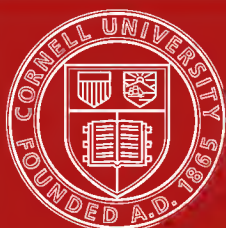


Cornell Law School Library

CORNELL UNIVERSITY LIBRARY



3 1924 069 393 605



Cornell University
Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.



**THREE YEAR
CUMULATIVE SUPPLEMENT
1925
HEATON'S
SURROGATES' COURTS
FOURTH EDITION**

Containing the Amendments, Additions and References to the changes in the law to the close of the regular 1925 session of the New York State Legislature, together with Annotations and Digest of Cases to July 1, 1925, affecting SURROGATES' PRACTICE, since the date of the Fourth Edition of this work.

It gives all the material which was contained in the earlier 1923 and 1924 Supplements—all under one arrangement. The original two volumes are brought to date in this single volume Supplement.

ALWAYS examine the original pages of HEATON, 2 volumes, first; then consult this 1925 Supplement.

1925 SUPPLEMENT

(THREE YEAR CUMULATIVE SUPPLEMENT.)
(Including all prior Supplements.)

HEATON'S SURROGATES' COURTS

FOURTH EDITION

Containing the Amendments, Additions and References to
the changes in the law to July, 1925, together with
annotations and digest of the cases affecting
Surrogates' Practice since the date of
the fourth edition of this work

BY

WILLIS E. HEATON

Former Surrogate of Rensselaer County



ALBANY, N. Y.

MATTHEW BENDER & COMPANY,
INCORPORATED.

1925

B 17269.
Copyright, 1925,
By WILLIS E. HEATON.
A. A.

EXPLANATIONS

Italics in the reprint of laws show the recent amendments made.

The paragraph numbers (¶) show the paragraphs of the Fourth Edition and also of the Third Edition as they have the same numbers.

In some instances, where so stated, the paragraphs are also found in the Supplement.

TABLE SHOWING WHERE THE SECTIONS OF THE SURROGATES' COURT ACT ARE CITED

(Volume 2 begins with No. 175.)

S. C. A.	Book Para.	S. C. A.	Book Para.
2.	2	34.	13
3.	2	35.	13
4.	2	36.	13
5.	2	37.	4
6.	3	38.	4
7.	3	39.	4
8.	4	40.	14
9.	4	41.	20
10.	4	42.	16
11.	4	43.	16
12.	4	44.	16
13.	4	45.	17-81
14.	4	46.	16
15.	4	47.	19
16.	5	48.	24
17.	5	49.	25
18.	5	50.	25
19.	5, 115	51.	25
20.	4-6	52.	26
21.	10	53.	26
22.	10	54.	26
23.	10	55.	27
24.	10	56.	28
25.	10	57.	28
26.	10	58.	28
27.	10	59.	28
28.	10	60.	27
29.	11	61.	29
30.	11	62.	29
31.	11	63.	30
32.	2-12	64.	30
33.	14, 45	65.	365

TABLE OF SECTIONS CITED.

S. C. A.	Book Para.	S. C. A.	Book Para.
66.	15-32	112.	123
67.	31	113.	125
68.	31	114.	126
69.	31	115.	125
70.	31	116.	127
71.	32	117.	127
72.	32	118.	82
73.	32-48	119.	83
74.	32-48	120.	83
75.	32	121.	86
76.	32	122.	87
77.	32-50	123.	82
78.	33	124.	88
79.	33-35	125.	88
80.	33-464	126.	90
81.	33	127.	242
82.	33	128.	243
83.	34	129.	243
84.	34	130.	243
85.	108	131.	243
86.	108	132.	90
87.	34	133.	91
88.	102	134.	91
89.	102	135.	91
90.	102	136.	92
91.	103	137.	40
92.	103	138.	43
93.	103	139.	44
94.	104	140.	45
95.	105	141.	48
96.	105	142.	49
97.	105	143.	51
98.	105	144.	63
99.	106	145.	68
100.	106	146.	77
101.	107	147.	52
102.	109	148.	52
103.	109	149.	53
104.	110	150.	74
105.	118	151.	74
106.	119	152.	74
107.	120	153.	74
108.	120	154.	66-110
109.	121	155.	77
110.	121	156.	77
111.	122	157.	78

TABLE OF SECTIONS CITED.

vii

S. C. A.	Book Para.	S. C. A.	Book Para.
158.	78	204.	265
159.	111	205.	185
160.	111	206.	185
161.	112	207.	212-474
162.	112	208.	214
163.	113	209.	420
164.	114	210.	220
165.	114	211.	222, 223
166.	115	212.	226, 420
167.	79	213.	221
168.	80	214.	225
169.	77-105	215.	225
170.	79	216.	231
171.	79	217.	239, 302
172.	94	218.	290
173.	95	219.	345
174.	95	220.	345
175.	96	221.	303
176.	96	222.	313, 405
177.	96	223.	41
178.	96	224.	208
179.	97	225.	241
180.	98	226.	335
181.	98	227.	206
182.	98	228.	14
183.	94	229.	470
184.	99	230.	108
185.	99	231.	110
186.	99	232.	245
187.	100	233.	245
188.	100	234.	247
189.	100	235.	246
190.	101	236.	248
191.	101	237.	250
192.	101	238.	251
193.	101	239.	253
194.	351	240.	253
195.	188	241.	253
196.	188	242.	254
197.	189	243.	253
198.	190	244.	255
199.	190	245.	256
200.	192	246.	256
201.	193	247.	256
202.	195	248.	251
203.	197-265	249.	256

S. C. A.	Book Para.	S. C. A.	Book Para.
250.	252	284.	134
251.	357	285.	135-141
252.	357	286.	406
253.	359	287.	134
254.	360	288.	161
255.	361	289.	164
256.	362	290.	159
257.	362	291.	161
258.	243, 369	292.	164
259.	369	293.	165
260.	369	294.	166
261.	378	295.	166
262.	378	296.	
263.	384-381	297.	172
264.	398-382	298.	169
265.	398	299.	169
266.	368	300.	169
267.	441-440	301.	170
268.	473	302.	170
269.	474	303.	170
270.	448	304.	170
271.	492	305.	170
272.	469	306.	
273.	468	307.	164
274.	464-439	308.	164
275.	151	309.	171
276.	152	310.	171
277.	152	311.	316
278.	153	312.	316
279.	156	313.	316
280.	154	314.	476-369-319-36
281.	156	315.	476
282.	157-255	316.	476
283.	158	317.	476

INDEX TO LAWS AMENDED AND ADDED, WITH BRIEF REFERENCE TO CHANGES MADE.

Banking Law:

	Page
Sec. 188. Amendment regarding consent of executor to appointment of trust company.....	117

Civil Practice Act:

Sec. 182. Amendment fixing place of residence of representative in litigation	128
Sec. 457a. Directing verdict	33
Sec. 980. Amendment as to disposition of proceeds of infants cause of action	231
Sec. 1048. Relating to payment of proceeds of sale in partition.....	164
Sec. 1551. Amendment increasing fees of printers.....	129

Decedent Estate Law:

Sec. 15. Amendment eliminating word "male".....	37
Sec. 17. Amendment relating to gifts of more than one-half of estate for charitable purpose.....	169
Sec. 22a. Addition relating to validity of wills executed without the state	46
Sec. 25. Amendment correcting obsolete reference.....	47
Sec. 30. Amendment authorizing taking and filing affidavits of phy- sicians and subscribing witnesses.....	45
Sec. 44. Amendment relating to recording wills or papers where prop- erty passes by devise or descent.....	64
Sec. 45. Amendment regarding authentication of papers.....	65
Secs. 48, 104. Amendments regarding application of definitions...	176, 227
Secs. 81-85. Amendments affecting rights of parents on descent of property	193
Sec. 92. Amendment making no distinction of sex.....	194
Sec. 111. Amendment authorizing investments in shares of savings associations	202
Sec. 160. Amendment as to suits by or against foreign representa- tives	123

Domestic Relations Law:

Secs. 6 and 7. Amendments relating to void and voidable marriages.....	24, 25
Sec. 7a. Addition relating to dissolution of marriage.....	25
Sec. 10. Marriage a civil contract.....	24
Sec. 80. Amendment making rights of parents equal as guardians in socage	209
Sec. 110, &c. Amendments relating to adoption of adults and minors.....	17, 23

Membership Corporation Law:

Sec. 65a. Addition as to trust for burial grounds outside of cemeteries and large cities.....	198
Sec. 85. Amendment relating to perpetual care of cemetery lots....	197

Personal Property Law:

Sec. 10. Amendment defining income in relation to stock dividends..	208
Sec. 17a. Added relating to stock dividends.....	208
Sec. 21. Amendment relating to investment in shares of savings as- sociations	203

Poor Law:

Sec. 84. Amendment increasing amount allowed for burial of soldiers, sailors and marines.....	140
Secs. 130, 131, 132, 133. Amendment relating to support of infant from property of absconding parent.....	210

Real Property Law:

Sec. 66. Amendment relating to quantity of estates.....	147
Sec. 106. Amendment relating to leases by trustees.....	200
Sec. 116. Amendment allowing investment in property sold to corpora- tions	204
Sec. 196. Addition as to dower on dissolution of marriage.....	190
Sec. 240. Words of inheritance not necessary to create fee.....	174
Sec. 312. Amendment relating to authentication of acknowledgments and impression of seal.....	26

Surrogate's Court Act:

Sec. 15. Amendment as to compensation of acting surrogate.....	2
Sec. 18. Amendment as to vouchers.....	3
Sec. 21. Amendment as to clerks.....	5
Sec. 26. Amendment as to stenographers.....	6
Sec. 29. Amendment as to fees of surrogates and clerks.....	7
Sec. 30. Amendment as to fees of stenographers.....	10
Sec. 40. Amendment as to jurisdiction in discovery proceedings.....	10

	Page
Sec. 53. Amendment relating to contents of citation where number of respondents is large.....	27
Sec. 54. Amendment authorizing omitting citation to attorney-general in certain cases.....	28
Sec. 55. Amendment introducing term "respondent".....	28
Sec. 56. Amendment relating to service by publication.....	30
Sec. 63. Amendment relating to notice of appearance.....	30
Sec. 70. Amendment regarding jury trial by county judge.....	33
Sec. 96. Amendment regarding objections to issue of letters.....	117
Sec. 109. Added regarding release of sureties.....	126
Sec. 111. Added, providing proceeding for reduction of penalty of bond.	127
Sec. 118. Amendment relating to priority of right to administration..	70
Sec. 130. Amendment relating to leasing property by temporary administrators	160
Sec. 138. Amendment relating to probate of wills of citizens of Great Britain	47
Sec. 139. Amendment authorizing guardian to propound will.....	48
Sec. 141. Amendment authorizing probate of will which cannot be filed in court.....	49
Sec. 142. Amendment relating to testimony of absent subscribing witnesses	50
Sec. 148. Amendment in relation to notice of contest.....	53
Sec. 150. Amendment relating to retaining wills on file in another jurisdiction	63
Sec. 161. Amendment relating to grant of ancillary letters.....	121
Sec. 162. Amendment requiring citation to State Tax Commission on application for ancillary letters.....	122
Sec. 167. Amendment relating to designating clerk by testamentary trustee for service of papers.....	68
Sec. 168. Amendment relating to appointment of successor trustee....	68
Sec. 180. Amendment reducing penalty of bond.....	113
Sec. 188. Amendment as to time for qualifying of guardian by will or deed	114
Sec. 190. Amendment relating to guardian's annual account in certain large counties.....	115
Sec. 205. Amendment making it apply to guardians and to property disposed of and to money withheld.....	143
Sec. 206. Amendment authorizing decree directing payment for property disposed of or withheld.....	144
Sec. 207. Amendment regarding publishing notice to creditors where representative dies or is removed.....	150
Sec. 216. Amendment omitting definition of funeral expenses.....	157
Sec. 217. Amendment including expense of administration with debts for which sale may be had.....	158
Sec. 231a. Added, regarding compensation of attorney.....	14
Sec. 234. Amendment authorizing sale of real estate to pay funeral expenses	161

	Page
Sec. 236. Amendment making State a party to proceedings to mortgage, lease or sell real property.....	161
Sec. 262. Amendment regarding citation on voluntary judicial settlement	212
Sec. 271. Amendment increasing amounts of shares of infants payable directly	230
Sec. 278. Amendment increasing costs.....	135
Sec. 279. Amendment making additional allowance "costs".....	136
Sec. 284. Amendment regarding fees of appraisers.....	128
Sec. 285. Amendment increasing rate of commissions.....	130
Sec. 287. Amendment increasing fees of printers.....	129
Sec. 311. Amendment as to jurisdiction to take proof of heirship.....	192
Sec. 314. Amendments of section on definitions.....	231
Sec. 316. Amendment as to application of certain provisions of law...	231
 Tax Law:	
Sec. 220. Amendment relating to transfers by residents.....	81
Sec. 221. Amendment as to exceptions and limitations.....	82
Sec. 227. Amendment as to liability of certain corporations.....	79
Sec. 228. Amendment as to jurisdiction of surrogate.....	79
Sec. 230. Amendment as to proceedings by appraiser.....	83
Sec. 235. Amendment as to proceedings by district attorneys.....	91
Sec. 236. Amendment relating to receipts for taxes.....	92
Sec. 241. Amendment as to tax on contingent remainders, etc.....	89
Secs. 248 to 248p. Amendments enacting new regulations as to nonresidents and adding new sections.....	94
Secs. 249 to 249 l. Additions enacting an estate tax on taxes of over one million valuation.....	101
 United States Revised Statute:	
Sec. 159. Showing requirements for exemplification.....	66
 Laws of New York:	
Laws 1921, ch. 163, amended.....	8

SUPPLEMENT

TO

HEATON'S

SURROGATES' COURTS

¶ 1 *Page 4.*

Addition of reference.

For additional discussion of Surrogate's Courts as courts of record and their jurisdiction, see ¶ 13, page 46 *et. seq.*

¶ 2 *Page 5.*

Continuation of subject restricting "Judges" from practicing law.

A former surrogate may appear in a contested probate proceeding although the same had been in some of its phases before him as surrogate. The word "judge" in this section of the judiciary law does not include one who was formerly a surrogate but whose term of office has expired. *Matter of Wheelock*, 200 N. Y. Supp. 157, 205 App. Div. 654.

¶ 4 *Page 8.*

Addition to subject of method of obtaining trial with jury in Kings county.

Where the surrogate is disqualified and the county judge as acting surrogate transfers the proceeding to the supreme

court at special term, such special term has complete jurisdiction of the matter and may send it to the trial term for trial by jury, after which the proceedings are reported back. *Matter of Talbot*, 121 Misc. Rep. 502, 201 N. Y. Supp. 571.

See special reference to Kings county following subd. 4, sec. 8, Sur. Ct. Act, page 8.

Page 12.

Amendment to section 15, Sur. Ct. Act, relating to Compensation of Acting Surrogates.

§ 15. Compensation of acting surrogate.

An officer, or a person appointed by the board of supervisors, or board of aldermen, who acts as surrogate of any county during a vacancy in the office, or in consequence of disability, as prescribed in this article, must be paid, for the time during which he so acts, a compensation equal pro rata to the salary of the surrogate; or, in a county where the county judge is also surrogate, to the salary of the county judge. The amount of his compensation must be audited and paid in like manner as the salary of the surrogate, or of the county judge, as the case may be. Where an officer of the county performs the duties of the surrogate with respect to a particular matter wherein the surrogate is disqualified or precluded from acting, the supervisors of the county, or board of aldermen, must allow him *such* compensation as *would* equal pro rata the salary of the surrogate to be audited and collected in the same manner; and the salary of his other office shall cease during the period in which he acts as surrogate. Should the pro rata salary of the surrogate be less than that of the office of the officer acting as surrogate, then such officer shall be entitled to the salary of his first office and to that alone. (Amended by Laws 1922, ch. 320, § 1. In effect Sept. 1, 1922.)

Compensation of Special County Judge Acting as Surrogate.

Where a special county judge was duly authorized to act as surrogate and did so act he was allowed the per diem compensation of the surrogate in addition to his salary as special county judge. *Barhite v. Callister*, 199 App. Div. 234, 191 N. Y. Supp. 461.

For cases where a different compensation was allowed see *People ex rel. Sholes v. Bd. of Sup.*, 82 Hun 105, 31 N.

Y. Supp. 63; *Matter of Tyler*, 60 Hun 566, 15 N. Y. Supp. 366.

¶ 5 Page 14.

References to certain subdivisions in sec. 16, Sur. Ct. Act.

Subd. 6.

See Real Property Law, § 274; Personal Property Law, § 32; Surrogate's Court Act, § 251, page 1696.

Subd. 7.

See Surrogate's Court Act, § 33, page 45.

Page 15.

Amendment to sec. 18, Sur. Ct. Act, permitting vouchers to be returned or destroyed after ten years from filing petition in the accounting proceeding where no decree has been made.

§ 18. Papers and books to be preserved and bonds filed.

The surrogate must carefully file and preserve in his office every deposition, affidavit, petition, report, account, voucher, or other paper relating to any proceeding in his court and deliver to his successor all the papers and books kept by him, except that vouchers may be returned to the accounting party after two years, or destroyed after five years from the date of the decree which allowed the payments represented by them, *or where no decree has been made, they may be so returned or destroyed after ten years from the date of the filing of the petition in the accounting proceeding.* (Amended by Laws 1924, ch. 175. Effective immediately.)

In many surrogate's offices the filing of vouchers is discouraged, since under sec. 263 S. C. A. vouchers need not be filed unless requested (¶ 381). However, the saving of space in surrogate's offices might well come by the destruction of vouchers after five years rather than by leaving them in the possession of the parties to be almost immediately lost or destroyed.

¶ 6 Page 18.

Additional reference.

For further discussion of Process in Surrogate's Court and order to show cause, see ¶ 26, page 132.

¶ 7 Pages 23, 24, 25.

Continuation of subject "power to grant a new trial." Page 23.

The right to take new or additional evidence on appeal in a probate case will influence the court to deny a motion for a new trial in the surrogate's court. *Matter of Taylor*, 198 App. Div. 944, 190 N. Y. Supp. 60, affirmed 233 N. Y. 570.

Page 24.

Continuation of subject "opening decree."

A serious error in the amount of interest with which a guardian has charged himself was considered sufficient reason for opening a decree in *Matter of Flynn*, 20 N. Y. Supp. 919, aff'd 136 N. Y. 287.

Page 25.

Continuation of subject "right to open decree of probate."

Where an after-born child has not been cited the decree of probate should be opened and the allegation as to heirs and next of kin corrected thereby, but if no provision is made for such after-born child, he need not be cited (¶ 45, p. 259), and is not entitled to contest the will since under §§ 26 and 28 Dec. Est. L., the interest of the child is not affected by the will. *Matter of Salamy*, 119 Misc. Rep. 17, 194 N. Y. Supp. 840, aff'd. 196 N. Y. Supp. 950.

Page 30.

Continuation of general subject of powers of Surrogate under sec. 20, Sur. Ct. Act.

Subds. 8 and 9.

A motion made before a former surrogate and undecided by him may be taken up and decided on due application, by the surrogate then in office. *Matter of Rawson*, 120 Misc. Rep. 713, 200 N. Y. Supp. 447.

¶ 9 *Page 34.*

Continuation of subject "examination before trial in probate proceedings."

Only persons shown to be "adverse" should be examined, and then only as to occurrences after the date of the execution of the will. *Matter of Levy*, 198 App. Div. 773, 191 N. Y. Supp. 95.

A legatee or devisee, though not cited, but who has been properly served with the notice of contest (p. 288), is a party to the proceeding and may be examined before trial. *Matter of Vail*, 120 Misc. Rep. 430, 198 N. Y. Supp. 661.

¶ 10 *Page 36.*

Amendment to sec. 21, Sur. Ct. Act, relating to appointment and salary of clerks.

§ 21. Clerk and deputy clerk of surrogate's court, and clerks in surrogate's office; appointment; salary.

By a written order filed and recorded in his office which he may in like manner revoke at pleasure, a surrogate may appoint a clerk of the surrogate's court, and in any county containing a city of the second class, and in the counties of Monroe and Erie the surrogate may also appoint a deputy clerk of said court and in the counties of Cayuga, Chautauqua, *Nassau* and Cattaraugus, the surrogate may designate one of his clerks to act as deputy clerk of said court.

Each surrogate may appoint, and at pleasure remove, as many other clerks for his office, to be paid by the county, as the board of supervisors of his county, or in the city of New York the board of aldermen, authorize him so to appoint.

The board of supervisors or, in the counties embraced within the city of New York, the board of aldermen, as the case requires, must fix the compensation of the clerk or clerks appointed under this section; and may authorize them, or either of them, to receive, for their or his own use, any legal fees permitted to be charged by law.

A surrogate may appoint, and at pleasure remove, as many additional clerks to be paid by him as he thinks proper. (Amended by Laws 1923, ch. 865, § 1. In effect May 29, 1923.)

Amended by inserting "Herkimer" in the first paragraph by Laws 1925, chap. 96. In effect March 9, 1925.

Page 39.

Amendment to sec. 26, Sur. Ct. Act, relating to appointment of stenographers.

§ 26. Stenographers in other counties.

The surrogate of each county, except New York, Kings, Bronx, Albany, Westchester, Hamilton, Queens, Richmond, Monroe and Erie, may in his discretion, appoint, and at pleasure remove a stenographer for his court, who shall receive a salary to be fixed by such surrogate not exceeding, in counties having a population less than thirty thousand, eight hundred dollars per annum; in counties having a population of thirty thousand or more, not exceeding twelve hundred dollars per annum, except that in Madison, *Montgomery, Ontario, Dutchess and Herkimer counties*, or in counties in which are located cities of the second class, or in counties in which are located three cities of the third class, such salary shall not exceed eighteen hundred dollars per annum; and except that in Oneida county such salary shall not exceed twenty-seven hundred dollars per annum; and in any county wholly containing a city of the first class, such salaries shall not exceed two thousand dollars per annum. The population of the several counties shall be determined by the last preceding census. The board of supervisors shall provide for the payment of such salary in the same manner as other county salaries are paid. When not actually engaged in the discharge of his duties as stenographer, he shall perform such clerical duties in connection with the surrogate's court as the surrogate directs. In counties wherein the surrogate is also county judge, the stenographer so appointed shall be the stenographer of the county court, and shall perform the duties pertaining to a stenographer of the county court

without additional compensation, except that in Broome county such stenographer shall receive an additional salary, to be fixed by the county judge, not exceeding twelve hundred dollars per annum. In counties where, for any cause, a regular stenographer for his court has not been appointed, as provided by this section, the surrogate may, in individual proceedings requiring the services of a stenographer, appoint a stenographer who shall be paid a reasonable compensation, certified by the surrogate in every case in which he takes notes of testimony, from the estate or matter in which such services are rendered.

When the regular stenographer appointed under this or the last section is sick, absent, on his vacation, or unable to act for other good cause, the surrogate may designate a stenographer to act temporarily in his place, who shall be paid by the county a reasonable compensation certified by the surrogate. (Amended by Laws 1924, chap. 586. In effect April 15, 1924.)

Amended by adding Steuben and Ulster counties, Laws 1925, chap. 580. In effect Apr. 9, 1925.

¶ 11 Page 40.

Amendment to sec. 29, Sur. Ct. Act, relating to fees and expenses of clerks and Surrogates.

§ 29. Fees for copying or recording papers.

The clerk of the surrogate's court may charge and receive to the use of the county the following fees, except that where the board of supervisors or board of aldermen have allowed him to receive fees for his own use the same may be received and retained by said clerk:

1. For furnishing a transcript of a decree to be filed in the clerk's office, fifty cents.

2. For making a copy of the proceedings and evidence in any matter, *ten* cents per folio.

3. For recording agreements settling estates or accounts, releases, assignments, or mortgages of, or liens upon, any interest in an estate or fund; wills probated in another county or state, and the papers required to be recorded therewith, *fifteen* cents for each folio.

4. For a certificate, other than a certificate that a paper, for the recording of which he is entitled to a fee, is a copy, twenty-five cents.

5. For making and certifying a copy of a will or paper on file or recorded in such office, *fifteen* cents for each folio.

6. For comparing and certifying that a paper is a copy of a record or paper on file, twenty-five cents and five cents for each folio; and for comparing and certifying a case on appeal where printed copies thereof are presented by any party to any proceeding, one cent for each folio.

7. For recording the official bond or undertaking of an executor, administrator, guardian or trustee, *fifteen cents a folio*, except that where the clerk receives a salary as full compensation for his services no fee shall be charged for such recording. The board of supervisors, or board of aldermen, may fix a different rate of compensation, and may require the clerk to keep an account of all such fees and make report thereof whenever requested by such board.

On the appointment of a guardian, if it appears that the application is made for the purpose of enabling a minor to receive bounty, arrears of pay or prize money, or pension due, or other dues or gratuity from the federal or state government, for the services of the parents or brother of such minor in the military or naval service of the United States, no fees shall be charged or received. (Amended by Laws 1923, ch. 786, § 1. In effect Sept. 1, 1923.)

Page 41.

New York County. Laws of 1921, ch. 163, as amended.

(Only those subdivisions are reprinted which were amended.)

§ 1. Fees of clerk of court of surrogate's court.

1. For furnishing a transcript to be filed in the county clerk's office, *one dollar*. (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

3. For making and certifying a copy of a will, or any paper on file, or recorded in his office, *twenty-five cents* for each folio, *but the minimum charge shall be two dollars*. (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

4. For comparing and certifying that a paper is a copy of a record or paper on file, ten cents for each folio, with a minimum fee of twenty-five cents; and for comparing and certifying a case on appeal where printed copies thereof are presented by any party to any proceeding, *ten cents* for each folio. (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

5. For filing the official bond or undertaking of an executor, administrator, guardian, trustee, or other fiduciary, *one dollar*. (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

6. For recording any instrument, decree, or other paper which is required by law to be recorded, and for which no fee is otherwise provided, *fifteen cents* for each folio. (Amended by Laws 1923, ch. 749; Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

7. For taxing a bill of costs, *one dollar*. (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

8. For issuing a certificate of notice of claims filed, *one dollar*. (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

9. For filing a petition whereby any proceeding is commenced, except a petition filed in connection with matters mentioned in subdivision thirteen hereof, one dollar, *except that where the gross value of the estate is more than ten thousand dollars, the fee shall be three dollars.* (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

11. For issuing executions upon judgments, *one dollar.* (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

13. For filing a will for probate, *where the gross estate is more than ten thousand dollars, the fee shall be ten dollars, where the gross estate is less than ten thousand dollars, the fee shall be five dollars, which shall include all fees in the probate proceeding, except if the will be contested, it shall not include the fee for filing a note of issue and the fee for demanding a trial by jury.* For recording or filing an exemplified copy of a foreign will, twenty cents per folio with a minimum charge of *ten dollars, regardless of the limitations as to the amount of the estate contained in subdivision eighteen.* (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

16. For producing papers, documents, books of record on file in his office under a subpoena duces tecum, if within the county where the public office is situated, *one dollar*; if within any other county, one dollar additional for each day, or part thereof, the messenger is detailed from the office, in addition to mileage fees of eight cents per mile and the necessary expenses of messenger. (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

18. In any case where the gross estate is shown by affidavit not to exceed the sum of one thousand dollars, no fees shall be charged except for certificates, certified copies of papers, recording instruments other than wills, subpoenas, and the expenses provided by subdivision seventeen hereof.

In any proceeding brought by a guardian or for the appointment of a guardian if it appears that the application is made for the purpose of enabling a minor to receive bounty, arrears of pay or prize money, or war risk insurance, or pension due, or other dues or gratuity from the federal or state government, to such minor arising out of the military or naval service of the United States, no fee shall be charged or received. (Amended by Laws 1924, ch. 293, § 1. In effect June 1, 1924.)

This subdivision was also amended by Laws 1924, ch. 305, § 1. See following subdivision.

18. In any case where the gross estate is shown by affidavit not to exceed the sum of one thousand dollars, no fees shall be charged except for certificates, certified copies of papers, recording instruments other than wills, subpoenas, and the expenses provided by subdivision seventeen hereof.

On the appointment of a guardian, if it appears that the application is made for the purpose of enabling a minor to receive bounty, arrears of pay or prize money, or pension due, or other dues or gratuity from the federal or state government, for the services of the parents or brother of such minor in the military or naval service of the United States, no fee shall be charged or received. *For any certified copies of papers, certificates, or searches, or*

10 SUPPLEMENT TO HEATON'S SURROGATES' COURTS.

for other information, required by the state tax commission, no fee shall be charged to or received from such commission, and in any proceedings instituted by the state tax commission no fee shall be charged to or received from such commission. (Amended by Laws 1922, ch. 246; Laws 1924, ch. 305, § 1. In effect April 23, 1924.)

This subdivision was also amended by Laws 1924, ch. 293, § 1. See preceding subdivision.

19. *For filing a will for safe keeping pursuant to section thirty of the decedent estate law, five dollars. (Added by Laws 1924, ch. 293, § 2. In effect June 1, 1924.)*

Amending subds. 1 and 2 of sec. 30, Sur. Ct. Act, relating to fees of stenographers.

1. A stenographer, appointed or acting pursuant to sections twenty-six and twenty-seven of this act, may charge and receive a sum not exceeding *ten* cents per folio for furnishing a copy of the minutes, proceedings and testimony taken in surrogate's court to any person who applies for same. (Amended by Law 1923, ch. 648.)

2. Except where otherwise agreed or when special provision is otherwise made by statute, a stenographer is entitled, for a copy fully written out from his stenographic notes of the testimony required to be made in any proceeding for the record of the surrogate's court of the counties of New York, Bronx, Kings, Erie, *Westchester* and Monroe, ten cents for each folio; and the surrogate may order that the fees for such record copy be paid out of the estate to which the proceeding relates. (Amended by Laws 1923, ch. 295, § 1. In effect Sept. 1, 1923.)

¶ 14 Page 49.

Amendment to sec. 40, Sur. Ct. Act, concerning delivery of or payment for personal property withheld.

§ 40. General jurisdiction of surrogate's court.

Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make

a full, equitable and complete disposition of the matter by such order or decree as justice requires.

In addition to and without limitation or restriction on the foregoing powers each surrogate or surrogate's court shall have power, in the cases and in the manner prescribed by statute:

1. To take the proof of wills; to admit wills to probate; and to take and revoke probate of heirship.

2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee.

4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate or fund. *To enforce against a respondent the delivery of personal property, or the payment of the proceeds or value of personal property belonging to or withheld from an estate.*

5. To direct the disposition of real property, and interest in real property of decedents, and the disposition of the proceeds thereof.

6. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; to direct and control their conduct, and settle their accounts.

7. To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

8. To determine the validity, construction or effect of any disposition of property contained in any will proved in his court, whenever a special proceeding is brought for that purpose, or whenever it is necessary to make such determination as to any will in a proceeding pending before him, or whenever any party to a proceeding for the probate of any will, who is interested thereunder, demands such determination in such proceeding. (Amended by Laws 1924, ch. 100. In effect Sept. 1, 1924.)

This amendment increases the jurisdiction of the surrogate to reach, in discovery proceedings, property or the avails of property which it is shown was assets of the estate and which has been secreted, disposed of or converted into money. *In Matter of Hyman*, 237 N. Y. 211, the court of appeals held that the surrogate's court had no jurisdiction when such facts appeared, and as a result this addition was made to the general jurisdiction, and the necessary amend-

ments made to sections 205 and 206 S. C. A. to enforce such jurisdiction. See §§ 184 and 185 Suppl.

Page 50.

Addition to general subject of jurisdiction of Surrogate.

Subd. 3 of § 40.

Where an account is filed without dates of receipts and disbursements and without specifications of the character of such receipts and disbursements the surrogate may order a more complete account filed. *Matter of Miller*, 116 Misc. Rep. 51, 189 N. Y. Supp. 575.

Page 52.

Continuation of subject "Equitable powers."

On a judicial settlement where a bank presented a claim against an estate growing out of litigation in which it had to make good money drawn from the bank in a fiduciary capacity and misapplied, the court held that the surrogate had jurisdiction to try such a claim. *Matter of Seaman*, 205 App. Div. 681, 200 N. Y. Supp. 504.

Page 54.

Continuation of subject "Surrogate may give directions as to custody of property."

In *Matter of Seaman*, 120 Misc. Rep. 531, 199 N. Y. Supp. 794, the application of this section was extended to trying the question of title of one executor to certain articles claimed by him as his individual property and he was directed to make restitution to the estate, the evidence showing that he had disposed of the same.

¶ 17 *Page 67.***Continuation of subject "Petition prima facie evidence."**

An allegation of residence, controverted and unsupported by evidence, will not give jurisdiction to probate a will. *Matter of Macy*, 118 Misc. Rep. 875, 195 N. Y. Supp. 499.

Where the petition and supporting affidavits are not controverted by answer or otherwise the facts therein alleged are to be taken as true. *Matter of French*, 119 Misc. Rep. 445, 196 N. Y. Supp. 397.

*Page 67.***Continuation of subject "Proof of death of intestate."**

It was said in *Matter of Rowe*, 197 App. Div. 449, 189 N. Y. Supp. 397, affd. 232 N. Y. 554, that letters of administration are not *prima facie* proof of death of the intestate, but are conclusive evidence of the authority of the person to whom granted, and are sufficient to establish the representative character of the party who assumes to act by virtue thereof.

¹¹ *Page 70.***Continuation of subject "When presumption effective."**

Where the presumption of death has been acted upon, if the decree fixes any date of death it should be in most cases fixed as at the end of seven years from the date of the last knowledge that the person was alive. *Matter of Rowe*, 197 App. Div. 449, 189 N. Y. Supp. 397. See also *Langrick v. Rowe*, 212 App. Div. 404, 209 N. Y. Supp. 22.

*Page 73.***Continuation of subject of "presumption of death in partition."**

Where evidence of long absence is satisfactory, presump-

tion of death seven years after being last heard from is effective, and a remarriage with birth of other children will not be presumed. *Langrick v. Rowe*, 212 App. Div. 404, 209 N. Y. Supp. 22.

¶ 19 Page 79.

Continuation of subject "Location of property."

Jurisdiction of the several states over property located therein.

"The full faith and credit clause of the federal Constitution is now interpreted to mean that every state has exclusive jurisdiction over property within its borders, and where testator has property in more than one state, each state has jurisdiction over the property within its limits and can in its own courts provide for the disposition thereof in conformity with its laws. *Brown v. Fletcher's Estate*, 210 U. S. 82, 89, 90, 28 Sup. Ct. 702, 52 L. Ed. 966; *Iowa v. Slimmer*, 248 U. S. 115, 39 Sup. Ct. 33, 63 L. Ed. 158; *Thormann v. Frame*, 176 U. S. 350, 353-356, 20 Sup. Ct. 446, 44 L. Ed. 500. In overruling the Roderigas case the Supreme Court of the United States followed the views of the House of Lords. *Concha v. Concha*, 11 App. Cas. 541, 551-554, 564, 572.

As the highest court of the British Empire has found it impossible to make a probate decree conclusive outside of the jurisdiction of the local government wherein it was rendered, the ruling of the United States Supreme Court adopting that rule here, contrary to the former and overruled practice of this state, is now the law of New York and of every other state." *Hutton v. Blackburn*, 117 Misc. Rep. 434, 192 N. Y. Supp. 527.

The legal situs of stock is where the corporation issuing it exists, or where the owner is domiciled. *Matter of Macy*, 118 Misc. Rep. 875, 195 N. Y. Supp. 499.

¶ 21 Page 86.

Jurisdiction of Surrogate to fix compensation of attorney at any time given by sec. 231a added to Surrogate's Court Act.

§ 231-a. Compensation of attorney.

At any time during the administration of an estate, and irrespective of the pendency of a particular proceeding, the surrogate shall have power to hear an application for and to fix and determine the compensation of an attorney for services rendered to an estate or to its representative, or to a devisee,

legatee, distributee or any person interested therein; or in proceedings to compel the delivery of papers or funds in the hands of such attorney.

Such proceedings shall be instituted by petition of a representative of the estate, or a person interested, or an attorney who has rendered services. Notice of the application shall be given in such manner as the surrogate may direct. The surrogate may direct payment therefor from the estate generally or from the funds in the hands of the representative belonging to any legatee, devisee, distributee or person interested therein. (Added by Laws 1923, Chap. 526. In effect September 1, 1923.)

This section does not grant authority to allow a legatee or his attorney compensation in a case where he has brought an unsuccessful proceeding for the probate of a will. (See ¶ 153.) *Matter of Parsons*, 121 Misc. Rep. 747, 202 N. Y. Supp. 190, *affd.* 202 N. Y. Supp. 942, *affd.* 208 App. Div. 769, 236 N. Y. 580.

In commenting on this new section in the opinion in the foregoing case Mr. Surrogate Foley said:

“Prior to the enactment of this amendment, the power of this court to fix and determine the compensation of an attorney for services rendered to a representative of an estate and to direct payment thereof out of the funds of the estate had been established by judicial decisions. *Matter of Smith*, 111 App. Div. 23, 97 N. Y. Supp. 171; *Matter of Rabell*, 175 App. Div. 345, 162 N. Y. Supp. 218; *Matter of Nauss*, N. Y. Law Journal, May 28, 1920, *affirmed* 193 App. Div. 937, 184 N. Y. Supp. 938; *Matter of Shipman*, 116 Misc. Rep. 405, 189 N. Y. Supp. 894, *affirmed* 200 App. Div. 896, 192 N. Y. Supp. 950, *affirmed* 234 N. Y. 499. Where, however, disputes arose between an attorney and a client other than a representative of an estate, this court had no jurisdiction.

The general purpose of the revision of the code in reference to surrogate's courts, made in 1914 (now embodied in the Surrogate's Court Act), was to centralize and unify all proceedings relating to estates in those courts and to put an end to the former practice, resulting in delay and expense in the settlement of estates, when the parties were remitted to other courts to have disputes determined. This purpose is set forth generally in the introduction to section 40, Surrogate's Court Act. *Matter of Aldrich*, 194 App. Div. 815, 185 N. Y. Supp. 715; *Matter of Malcomson*, 188 App. Div. 600, 177 N. Y. Supp. 238. In keeping with this general policy of expedition and unified jurisdiction, the Legislature, in 1923, enacted section 231-a, Surrogate's Court Act.

This amendment, which conferred plenary power upon the surrogate to dispose of disputes, incorporated into statute what had already been settled

by the judicial decisions just quoted (*Matter of Smith, supra*), with reference to fixing the compensation of attorneys for representatives. In addition, it conferred upon this court power to determine disputes arising between attorneys and *beneficiaries* of funds administered in this court. It also eliminated any doubt as to the power of the surrogate to order substitution of attorneys and to compel delivery of papers or funds in the estate to a new attorney retained by a client. Under the language of this section, relief may also be obtained at any time during the course of the administration of an estate, and regardless of whether a particular proceeding is pending. The basis of the authority granted by this amendment is the existence of the fund in the process of administration under the supervision of the surrogate's court."

See also ¶ 153, where the general subject of costs and allowances is discussed.

Continuation of subject of fixing value of services of attorney.

Section 231-a of the Sur. Ct. Act is new, and there are no decisions reported which indicate the weight to be given on appeal to the surrogate's finding. Probably the same rule applies as on an appeal from any other decision made by a surrogate. The court undoubtedly has jurisdiction to make a new decision, varying the amount; but a presumption exists in favor of the surrogate's decision, the same as in favor of a general verdict of a jury. Surrogate's Court Act, § 71. *Matter of Potts*, — App. Div. —, 209 N. Y. Supp. 655.

¶ 22 Page 94.

General amendments to sections 110, 111, 112, 113, 115, 117 and 118, Domestic Relations Law, concerning adoption of minors, particularly through and from institutions, and giving the children's court certain jurisdiction. Laws 1924, chap. 323. In effect July 1, 1924.

Among other changes in the law it should be noted that if the child to be adopted is under sixteen years of age it must have resided with the foster parent for at least six months, unless the period is shortened by order of the judge; an in-

dependent investigation of the facts must be made and reported; where practical the adopting parents must be of the same religious faith as the child, and the papers must be filed in the office of the judge granting the adoption while only the order of adoption is filed in the county clerk's office.

Amendments of Laws 1925 provide for adoption of natural children by either spouse, and for dispensing with personal appearance when consents are filed executed as a deed to be recorded.

Amendment to section 110, Domestic Relations Law, providing for adoption of natural children of either husband or wife.

§ 110. Definitions; effect of article.

Adoption is the legal act whereby an adult person takes another adult person or a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such adult or minor. Hereafter, in this article, the person adopting is designated the "foster parent." A voluntary adoption is any other than that of a destitute or and dependent child, or one who is a public charge from an "authorized agency," orphan asylum or charitable institution. "Lawful custody" in this article shall mean "custody" pursuant to and in compliance with expressed provisions of statute law.

An adult unmarried person, or an adult husband and his adult wife together, may adopt a person of the age of twenty-one years and upwards or a minor in pursuance of this article; *and an adult husband or an adult wife also may adopt the natural child of the other spouse, of the age of twenty-one years and upwards or a minor, in pursuance of this article;* and no child shall hereafter be adopted except in pursuance thereof. Proof of the unlawful adoption of a person of the age of twenty-one years and upwards or a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder. Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created; and nothing in this article in regard to an adult adopted pursuant hereto inheriting from the foster parent applies to any will, devise or trust, made or created before April twenty-second, nineteen hundred and fifteen, alters, changes or interferes with such

will, devise or trust, and as to any such will, devise or trust, an adult so adopted is not an heir so as to alter estates or trusts or devises in wills so made or created. (Amended by Laws 1924, ch. 323; Laws 1925, ch. 608, § 1. In effect April 11, 1925.)

For definition of "abandoned child," see L. 1922, ch. 547, § 2, sub. 6, as amended by L. 1924, ch. 436, § 2.

For other definitions, see State Charities Law, art. 16, § 300.

§ 111. Whose consent necessary.

Consent to adoption is necessary as follows:

1. Of the minor, if over twelve years of age;
2. Of the foster parent's husband or wife, unless lawfully separated, or unless they jointly adopt such minor;

3. Of the parents or surviving parent of a legitimate child; and of the mother of an illegitimate child, but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery, or *who is insane as defined by the insanity law or judicially declared incompetent or who is a mental defective as defined by the mental deficiency law, or adjudged to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary; excepting, however, that where such parents are divorced because of his or her adultery, notice shall be given to both the parents personally or in such manner as may be directed by a judge of a court of competent jurisdiction.*

4. Of a person of full age having lawful custody of the child, if any such person can be found, where the child has no father or mother living, or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption.

5. Where a minor to be adopted is of the age of eighteen years or upwards, the judge or surrogate may direct, in his discretion, that the consents of the persons referred to in the preceding subdivisions of this section shall be waived, if in his opinion, the moral or temporal interests of such minor will be promoted thereby and such consents cannot, for any reason, be obtained. Where the person to be adopted is of the age of twenty-one years and upwards, the consents of the persons referred to in the preceding subdivisions of this section shall not be required.

Evidence of abandonment.

In determining whether parents abandoned child, within Domestic Relations Law, § 111, subd. 3, so as to authorize

its adoption without their consent, evidence should at least warrant inference that parents at some point of time definitely dropped their parental interests; question being one of fact, requiring considerable degree of clearness of proof of renunciation. *Matter of Bistany*, 204 N. Y. Supp. 599, 209 App. Div. 286, affd. 239 N. Y. 19, reversing *Matter of Bistany*, 121 Misc. Rep. 540, 201 N. Y. Supp. 684.

For a more full discussion of domestic relations, see Schouler on Marriage, Divorce, Separation & Domestic Relations, 6th Edition.

Amendment to section 112, Domestic Relations Law, providing that personal appearance may be dispensed with where duly certified consent is filed.

§ 112. Requisites of voluntary adoption.

In adoption the following requirements must be followed:

1. The foster parents or parent, the person to be adopted and all the persons whose consent is necessary under the last section, must appear before the *children's court judge*, county judge or the surrogate of the county where the foster parent or parents reside, or, if the foster parents or parent do not reside in this state, in the county where the minor resides, and be examined by such judge or surrogate, except as provided by the next subdivision.

2. They must present to such judge or surrogate a verified instrument containing substantially the consents required by this chapter, an agreement on the part of the foster parents or parent to adopt and treat the minor as his, or her or their own lawful child, and a statement of the date and place of birth of the person to be adopted, as nearly as the same can be ascertained, the religious faith of the parents and of the child, the manner in which the foster parents obtained the child, which statement shall be taken *prima facie* as true. If a change in the name of the minor is desired, such instrument may also state the new name by which the minor shall be known. The instrument must be signed by the foster parents or parent and by each person whose consent is necessary to the adoption, and severally acknowledged by said persons before such judge or surrogate; *but where the consent of a parent or person whose consent is necessary to the adoption is duly acknowledged and certified as conveyances are required to be certified to entitle them to record in this state, such judge or surrogate may grant the order of adoption without the personal appearance of such person or persons so executing such consent or consents.* In all cases where the consents of the persons mentioned in subdivisions one, two, three and four of section one hundred and eleven have been waived as

20 SUPPLEMENT TO HEATON'S SURROGATES' COURTS.

provided in subdivision five of such section, or where the person to be adopted is of the age of twenty-one years or upwards, notice of such application shall be served upon such persons as the judge or surrogate may direct.

3. *Where the child to be adopted is under sixteen years of age, the petition must show that the child to be adopted resided continuously with the foster parents, at least six months prior to the date of petition. In the discretion of the judge or surrogate, a child may be adopted when the period of residence is less than six months upon his certifying in the order the necessity of such adoption.*

4. *Before any adoption shall be made the court shall make or cause to be made an investigation by some person or agency specifically designated by the court to verify the allegations set forth in the instrument and such other facts relating to the child and foster parents as will give the court full knowledge as to the desirability of confirming the adoption. A written report containing the results of such investigation shall be submitted before the adoption is granted. (Section 112 amended by Laws 1924, ch. 323. Subd. 2 amended by Laws 1925, ch. 607, § 1. In effect April 11, 1925.)*

§ 113. Order.

If satisfied that the moral and temporal interests of the person to be adopted will be promoted thereby, the judge or surrogate must make an order allowing and confirming such adoption, and directing that the person to be adopted shall henceforth be regarded and treated in all respects as the child of the foster parent or parents. If the judge or surrogate is also satisfied that there is no reasonable objection to the change of name proposed, the order must also direct that the name of the minor be changed to such name as shall have been designated in the instrument mentioned in the last section. Such order must be filed and recorded in the office of the county clerk of such county and shall be open to the public. The fact of illegitimacy shall in no case appear upon the record. *The written report of the investigation, together with all other papers pertaining to the adoption, shall be kept by the judge or surrogate as a permanent record of his court, which may be sealed by him in his discretion and withheld from inspection by a proper order. No person shall be allowed access to such sealed records except upon an order of a court of record and such order shall not be granted except on good cause shown.*

§ 114. Effect of adoption.

Thereafter the parents of the person adopted are relieved from all parental duties toward, and of all responsibility for, and have no rights over such a child, or to his property by descent or succession, *except that where a husband or wife adopts a natural child of the other spouse such child shall thereafter for all purposes be regarded and treated as the legitimate offspring of the marriage of its natural parent and its foster parent.* Where a parent who has

procured a divorce, or a surviving parent, having lawful custody of a child, lawfully marries again, or where an adult unmarried person who has become a foster parent and has lawful custody of a child, marries, and such parent or foster parent consents that the person who thus becomes the stepfather or the stepmother of such child may adopt such child, such parent or such foster parent, so consenting, shall not thereby be relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession. If the order allowing and confirming the adoption shall direct that the name of the child be changed, the child shall be known by the new name designated in such order. His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the person adopted sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother, and such right of inheritance extends to the heirs and next of kin of the person adopted, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the person adopted is not deemed the child of the foster parent so as to defeat the rights of remaindermen. (Amended by Laws 1916, ch. 453; Laws 1925, ch. 608, § 2. In effect April 11, 1925.)

§ 115. Adoption from charitable institutions or an authorized agency.

An orphan asylum or charitable institution, incorporated for the care of orphan, friendless or destitute children or an authorized agency may place children for adoption. The adoption shall be effected in the same manner as provided heretofore in relation to voluntary adoptions by the execution of an instrument containing substantially the same provisions as the instrument provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation or authorized agency by the officer or officers authorized in writing by the directors thereof to sign the corporate name of such institution or authorized agency to such instruments, and signed by the foster parent or parents and each person whose consent is necessary to the adoption; and may be signed by the child if over twelve years of age; all of whom shall appear before the children's court judge, county judge or surrogate of the county where such foster parents reside or, if such foster parents do not reside in this state, in the county where such institution or authorized agency is located, and be examined except that such officers need not appear. In granting letters of adoption the court must, when practicable, only give custody through adoption to persons of the same religious faith as that of the child in accordance with article sixteen of the state charities law; and such

22 SUPPLEMENT TO HEATON'S SURROGATES' COURTS.

judge or surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the *same manner as provided heretofore in relation to voluntary adoptions* and the adoption shall take effect from the time of such filing and recording.

§ 117. Abrogation of adoption from a charitable institution or an authorized agency.

An authorized agency or and any institution or corporation which shall have been a party to the agreement by which a child was adopted, or and a minor who shall have been adopted in pursuance of this chapter or of any act repealed thereby, from an authorized agency or and an orphan asylum or charitable institution, or and any person on the behalf of such child, may make an application to the children's court judge, county judge or the surrogate's court of the county in which the foster parent then resides, or if the foster parent resides without the state, where the original papers of adoption are on file, or where the natural parent or parents or persons whose consent would be necessary to an original adoption reside, for the abrogation of such adoption, on the ground of cruelty, misusage, refusal of necessary provisions or clothing, or inability to support, maintain or educate such child, or attempt to or actually change or fail to safeguard the religion of such child, or of any violation of duty on the part of such foster parent toward such child; which application shall be by a petition setting forth the grounds thereof, and verified by the person or by some officer of the corporation or authorized agency making the same. A citation shall thereon be issued by such judge or surrogate, in or out of such court, requiring such foster parent to show cause why the application should not be granted. The provisions of the civil practice act and the surrogate's court practice relating to the issuing, contents, time and manner of service of citations issued out of a surrogate's court, and to the hearing on the return thereof, and to enforcing the attendance of witnesses, and to all proceedings thereon, and to appeals from decrees of surrogates' courts, not inconsistent with this chapter, shall apply to such citation, and to all proceedings thereon. Such judge or court shall have power to order or compel the production of the person of such minor. If on the proofs made before him, on the hearing on such citation, the judge or surrogate shall determine that either of the grounds for such application exists, and that the interests of such child will be promoted by granting the application, and that such foster parent has justly forfeited his right to the custody and services of such minor, an order shall be made and entered abrogating the adoption, and thereon the status of such child shall be the same as if no proceedings had been had for the adoption thereof.

After one such petition against a foster parent has been denied, a citation on a subsequent petition against the same foster parent may be issued or refused in the discretion of the judge or surrogate to whom such subsequent petition shall be made.

§ 118. Abrogation by foster parent of such adoption.

A foster parent who shall have adopted a minor in pursuance of this chapter or of any act repealed thereby, from an *authorized agency*, orphan asylum or charitable institution, may apply to the *children's court judge*, county judge or surrogate's court of the county in which such foster parent resides, or if the foster parent resides without the state, where the original papers of adoption are on file, or where the natural parent or parents or persons whose consent would be necessary to an original adoption reside, for the abrogation of such adoption on the ground of the wilful desertion of such child from such foster parent, or of any misdemeanor or ill behavior of such child, which application shall be by petition, stating the grounds thereof, and the substance of the agreement of adoption, and shall be verified by the petitioner; and thereon a citation shall be issued by such judge or surrogate in or out of such court, directed to such child, and to the *authorized agency* or *and* corporation which was a party to such adoption, or, if such corporation or *agency* does not then exist, to the *board, commission* or *official charged with the jurisdiction* of the poor of such county, requiring them to show cause why such petition should not be granted. Unless such *agency* or *and* corporation shall appear on the return of such citation, before the hearing thereon shall proceed, a special guardian shall be appointed by such judge or court to protect the interests of such child in such proceedings, and the foster parent shall pay to such special guardian such sum as the court shall direct for the purpose of paying the fees and the necessary disbursements in preparing for and contesting such application on behalf of the child. If such judge or surrogate shall determine, on the proofs made before him, on the hearing of such citation, that the child has violated his duty toward such foster parent, and that due regard to the interests of both require that such adoption be abrogated, an order shall be made and entered accordingly; and such judge or court may make any disposition of the child *as and in a new proceeding*. If such judge or surrogate shall otherwise determine, an order shall be made and entered denying the petition.

It will be noticed in this section and section 117 the use of "or and" and "as and". The new idea is that the reader may eliminate either one or use either one in reading the lines.

¶ 23 Page 104.

Continuation of subject of common-law marriage.

To constitute a common-law marriage there must be an agreement between the parties, a present consent per verba

de præsenti to take each other as husband and wife, to enter into a relation which was to continue until death did them part, with the resulting obligations of husband and wife. This consent is of itself sufficient, but for it there is no substitute or equivalent. 2 Kent's Com. § 77; *Brinkley v. Brinkley*, 50 N. Y. 184, 185; *Harbeck v. Harbeck*, 102 N. Y. 714; *Foster v. Hawley*, 8 Hun, 68; *Smith v. Smith*, 194 App. Div. 543, 185 N. Y. S. 558; *Bates v. Bates*, 7 Misc. Rep. 547, 27 N. Y. S. 872, Freedman, J.

In the absence of this intention and agreement, the facts of their sexual relations, that they lived together, that they used the same name, that they were regarded as husband and wife, do not supply the deficiency. Without this mutual bona fide intention and agreement there is no marriage at common law, under the statute (Domestic Relations Law, § 10), or, for that matter, in the ecclesiastical law. *Graham v. Graham*, 211 App. Div. 580, 207 N. Y. Supp. 195.

Marriage a civil contract.

Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential. § 10, Dom. Rel. Law.

Page 105. See ¶ 456, page 1939.

Amendments to sections 6 and 7, Domestic Relations Law, relating to void and voidable marriages.

Void marriages.

A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person; provided, that if such former marriage has been dissolved for the cause of the adultery of such person, he or she may marry again in the cases provided for in section eight of this chapter and such subsequent marriage shall be valid;

2. Such former husband or wife has been finally sentenced to imprisonment for life;

3. Such former marriage has been dissolved pursuant to section seven-a of this chapter. (Subd. 3 amended by L. 1922, ch. 279, section 1. In effect March 25, 1922. Substantially new.)

§ 7. Voidable marriages.

A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is eighteen years, provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage;

2. Is incapable of consenting to a marriage for want of understanding;

3. Is incapable of entering into the marriage state from physical cause;

4. Consents to such marriage by reason of force, duress or fraud.

Actions to annul a void or voidable marriage may be brought only as provided in the *civil practice act and rules of civil practice*. (Amended by Laws 1924, ch. 165. In effect immediately.)

Addition of 7a, Domestic Relations Law, concerning dissolution of marriage.

§ 7a. *Dissolution of marriage on ground of absence.* "A party to a marriage may present to the Supreme Court a duly verified petition showing that the husband or wife of such party has absented himself or herself for five successive years then last past without being known to such party to be living during that time; that such party believes such husband or wife to be dead; and that a diligent search has been made to discover evidence showing that such husband or wife is living, and no such evidence has been found. The court shall thereupon by order require notice of the presentation and object of such petition to be published in the same manner as required for the publication of a summons in an action in the Supreme Court where service of such summons is made by publication; such notice shall be directed to the husband or wife who has so absented himself or herself and shall state the time and place of the hearing upon such petition, which time shall be not less than twenty days after the completion of the publication of such notice; and if the court, after the filing of proof of the proper publication of said notice and after a hearing and proof taken, is satisfied of the truth of all the allegations contained in the petition, it may make an order dissolving such marriage. (Added by Laws 1922, ch. 279, § 3. In effect March 27, 1922.)

Page 111.

Continuation of subject "Presumption of marriage and legitimacy."

Where there are conflicting presumptions of unequal weight the stronger will prevail, and the presumption which has the least probability to sustain it must yield to the more probable one. *Palmer v. Palmer*, 162 N. Y. 130; *Matter of Cofer*, 119 Misc. Rep. 587, 196 N. Y. Supp. 767, aff. 206 App. Div. 657, 199 N. Y. Supp. 916, affd. 237 N. Y. 512.

¶ 25 *Page 126.*

Addition of new subject under "Pleadings."

Motion.

A motion relates to some incidental question collateral to the main object of the action or proceeding. A motion is not a remedy, but is connected with and dependent upon the principal remedy, and generally relates to matters of procedure *Matter of Jetter*, 78 N. Y. 601; *Matter of Sabin*, 117 Misc. Rep. 656, 191 N. Y. Supp. 766.

A motion is not a pleading (§ 49 S. C. A.), and a special proceeding can not be instituted by a motion; it must be instituted by petition.

Page 128.

Authentication of acknowledgements taken in foreign countries.

Consult Real Property Law, § 301, for specific directions.

Amendment to sec. 312 Real Property Law, as to certificate of authentication by omitting requirement in case an impression of seal is not required to be filed.

§ 312. Contents of certificate of authentication.

An officer authenticating a certificate of acknowledgment or proof must

subjoin or attach to the original certificate a certificate under his hand, and if he has, pursuant to law, an official seal, under such seal. Except when the original certificate is made by a judge of a court of record in Canada, such certificate of authentication must specify that, at the time of taking the acknowledgment or proof, the person taking it was duly authorized to take the same; that the authenticating officer is acquainted with the former's handwriting, or has compared the signature to the original certificate with that deposited in his office by such person; and that he verily believes the signature to the original certificate is genuine; and if the original certificate is required to be under seal, he must also certify that he has compared the impression of the seal affixed thereto with the impression of the seal of the person who took the acknowledgment or proof deposited in his office, and that he verily believes the impression of the seal upon the original certificate is genuine. A clerk's certificate authenticating a certificate of acknowledgment or proof, taken before a judge of a court of record in Canada, must specify that there is such a court; that the judge before whom the acknowledgment or proof was taken, was, when it was taken, a judge thereof; that such court has a seal; that the officer authenticating is clerk thereof; that he is well acquainted with the handwriting of such judge, and verily believes his signature is genuine. (Amendment to Real Prop. Law, Laws 1924, ch. 480. In effect immediately.)

¶ 26 Page 134.

Amendment to Section 53, Sur. Ct. Act, relating to general contents of citation where number is large.

§ 53. General contents of citation.

A citation must substantially set forth:

1. The name and residence of the petitioner, and of the person to whose estate or fund the proceeding relates.

2. The names of all the persons to be cited who have not waived its issue and service, or have not appeared, so far as the same can be ascertained, *but where the number of persons of any class to be cited exceeds five hundred it need not specify the name of each person of such class but may be directed to such class by such appropriate description as the surrogate may deem adequate.*

3. The time and place when the citation is returnable, which time must not be more than four months after the date thereof.

4. The object of the proceeding in regard to which the persons cited are required to **show cause**.

5. The date when the citation issues.

6. It must be attested in the name of the surrogate, and by the seal of his court. (Amended by Laws, 1922, ch. 485, § 1. In effect September 1, 1922.)

Page 137.

Amendment to section 54, Sur. Ct. Act, subd. 3, omitting requirement to cite attorney-general when all the interested parties are nonresident aliens.

3. In every case where it appears that there is no heir-at-law or next of kin, as the case may be; or that it is not known whether or not there be such; the citation shall be issued to the attorney-general of the state. (Amended by Laws 1925, chap. 577. In effect Sept. 1, 1925.)

¶ 27 Page 138.

Amendment to Section 55, Sur. Ct. Act, introducing the appellation "respondent."

§ 55. Citation; how served within state.

Personal service of a citation within the state shall be made as follows:

Upon an adult person, or upon an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served.

Upon an infant under the age of fourteen years, by delivering a copy thereof to his father, mother or guardian; or if there be none within the state, or if the infant does not reside with a parent, to the person having the care and control of him or with whom he resides, or in whose service he is employed. Upon a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, or upon a corporation by delivering a copy thereof in the manner prescribed for personal service of a summons in an action in the Supreme Court upon such a person, or upon a corporation. Upon a public officer by delivering a copy thereof to such officer, or to one of his duly constituted deputies.

Where it appears, by affidavit, to the satisfaction of the surrogate from whose court a citation is issued, that proper and diligent effort has been made to serve it as hereinbefore prescribed in this section upon a resident of the state whose place of residence or place of business is known, and that the person to be served cannot be found at his residence or place of business, and cannot be elsewhere served within the state within a reasonable time or, if found, that he evades service, so that it cannot be made; the surrogate may make an order directing that service thereof be made, by leaving a copy thereof, and of the order, if the *respondent* is a domestic corporation or joint stock or other unincorporated association at its principal office or place of business, or if a natural person at the residence of the *respondent* with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the *respondent's*

said place of business or office, or of his residence, and by depositing another copy thereof, properly enclosed in a postpaid wrapper, addressed to the *respondent* at its said principal office or place of business, or to him at his place of residence, in the post office at the place where he resides, or where said office, place of business or residence is located, or upon proof being made by affidavit that no such residence can be found, service of the *citation* may be made in such manner as the court may direct; the order, and the papers upon which it was granted, must be filed, and the service must be made, within ten days after the order is granted; otherwise the order becomes inoperative. On filing an affidavit, showing service according to the order, the citation is deemed served, and the same proceedings may be taken thereupon, as if it had been served by publication pursuant to an order for that purpose.

Where it is necessary in any special proceeding to cite known creditors, and it appears that the number of creditors or persons claiming to be creditors, residing within the state of New York, upon whom citation is required to be served, exceeds fifty, service thereof may be made upon them by publication thereof in such newspaper or newspapers and for such a length of time as shall be fixed by the surrogate, and by the mailing of a copy of such citation to each of them by deposit of a copy thereof in the post office, properly enclosed in a postpaid sealed wrapper addressed to each of them at his last known post office address as stated in the order, at least twenty days prior to the return day thereof. (Amended by Laws 1922, ch. 653, § 1. In effect April 13, 1922.)

Page 140.

Addition to subject "How service is made on an infant under 14 years of age."

Attention is called to the change in the manner of service of citation on an infant under fourteen years of age. The sometimes useless formality of handing a citation to an infant, especially when the infant is a baby, has been eliminated from the section, and the other requirements remain. In Supreme Court it has been held that it is not a valid service of a summons on an infant under the age of fourteen years, under sec. 225, Civ. Pr. Act, when it is made only on the guardian of the property, there being a guardian of the person of the infant although residing out of the state. *Hewitt v. F. L. & T. Co.*, 117 Misc. Rep. 444, 191 N. Y. Supp. 420.

¶ 28 Page 143.

Amendment to Section 56, Sur. Ct. Act, relating to service by publication.

§ 56. Service personally without the state, or by publication.

The surrogate from whose court a citation is issued *or to be issued* may make an order directing the service thereof personally without the state, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the state.

2. Where the person to be served is a resident of the state, and substituted service upon him cannot be authorized as provided in section fifty-five of this Act, *or where in the surrogate's discretion a person who is a resident of the state but is absent therefrom should be served without the state personally or by publication.*

3. Where it is to be served upon a party, or a person required to be made a party, whose name, or residence, cannot be ascertained.

4. Where it is to be served upon one or more unknown creditors, next of kin, heirs, legatees or other persons, either individually or included in a class, to whom a citation has been directed, designating them by a general description, as prescribed in this Act. (Amended by Laws 1922, ch. 653, § 1. In effect April 13, 1922.)

¶ 29 Page 155.

Addition to general subject of service by publication.

Former general rule of practice 86 is made section 97 Judiciary Law, and is amended with relation to designation of papers by the appellate division in which citations and other legal notices may be published in the first department. (See ch. 210, Laws 1923. In effect April 9, 1923.)

¶ 30 Page 156.

Amendment to Section 63, Sur. Ct. Act, relating to form of notice of appearance.

§ 63. Appearance; how made and effect thereof.

In a surrogate's court, a party of full age may, unless he has been judicially declared to be incompetent to manage his affairs, appear and prosecute or

defend a special proceeding in person, or by attorney regularly admitted to practice in the courts of record, at his election, except in a proceeding to punish him for contempt, or where he is required to appear in person, by special provision of law, or by special order of the surrogate. An appearance must be evidenced by a notice of appearance signed by the party or by his attorney, or in the case of a public officer, by such officer or a duly constituted deputy in the name of such officer, and filed in the surrogate's court; and where no citation has been served on the person appearing, such *appearance and notice must conform to the requirements of section forty-one of this Act.* (Amended by Laws 1922, ch. 653, § 1. In effect April 13, 1922.)

¶ 31 Page 162.

Continuation of subject "Trial by jury."

A trial with jury in Surrogate's Court is a modern procedure that was not known at the time of the adoption of the Constitution and hence not within its protection. The Legislature can abolish it at any time, and can regulate the procedure with relation thereto in any manner it deems wise. *Matter of Price*, 204 App. Div. 252, 197 N. Y. Supp. 778, aff'd 236 N. Y. 656.

Where right determined.

Where the contention is over a claim against an estate duly presented, the proper time to raise the question of the right of a jury trial is when the court has acquired jurisdiction of all the parties in a proceeding for judicial settlement. There is a difference between the time when a demand for a jury trial may be made and the time when the issue of a right to a trial by jury may be determined. *Matter of Hanna*, 121 Misc. Rep. 754, 202 N. Y. Supp. 42, appeal dismissed, 238 N. Y. 612.

Page 164.

Continuation of subject "Not entitled to trial by jury."

The trial of objections to an account need not necessarily

be with jury. *Matter of Stark*, 118 Misc. Rep. 240, 193 N. Y. Supp. 231.

In an accounting proceeding there is no absolute right to a jury trial of the issues, as the granting of such application would not be consistent with the spirit of the revision of 1914 or with the right as given originally. *Matter of Bearé*, 122 Misc. Rep. 519, 203 N. Y. Supp. 483.

“Entitled to trial by jury.”

The right to trial with jury in Surrogate's Court of a claim against an estate is upheld in *Matter of Stein*, 200 App. Div. 726, 193 N. Y. Supp. 298, where the history of the legislation on the subject is traced.

Page 165.

Framing the issues for trial by jury.

It is customary in the Surrogate's Court of New York county where the volume and importance of the litigation requires a uniform and well settled practice, to require counsel to come before the surrogate on two days cross notice to settle the issues, bringing with them their pleadings, proposed orders and notice of settling same, with proof of due service. *In re Plate*, 156 N. Y. Supp. 999, 93 Misc. Rep. 423.

Issues of law have no place among the issues to be framed for a jury trial (N. Y. Co.). *In re White's Will*, 106 Misc. Rep. 210, 174 N. Y. Supp. 424.

Addition of new subject “Consolidation of proceedings for probate of different wills.”

While consolidation of compulsory and voluntary proceedings concerning the same subject matter serve a useful purpose and may be had (see ¶ 365), and often proceedings for probate of wills of different date coming on to be

heard by a surrogate without a jury are heard together, the same practice does not obtain where more than one will is presented and a trial with jury demanded. In such cases the jury might be required to carry in their minds the evidence upon several different issues as to each will, and such evidence when received by the court in connection with the issues involved in the trial of one will might not be pertinent to the issues raised as to the other. This would result in a confused and unsatisfactory trial, and should not be allowed. *Matter of Pinkney*, 117 Misc. Rep. 262, 191 N. Y. Supp. 157.

Page 167.

Addition to subject "Directing verdict."

"The judge may direct a verdict when he would set aside a contrary verdict as against the weight of evidence." § 457a Civ. Pr. Act.

Amendment to sec. 70, Sur. Ct. Act, concerning trial with jury in cases where the surrogate is not also county judge.

§ 70. Jury; how obtained; fees of jurors and officers.

The surrogate, in courts other than those specified in section thirty-five of this act may conduct a trial by jury selected from the panel of jurors in attendance at any trial term of the supreme court or county court of his county. The surrogate may at any time order the drawing of a jury for service in surrogate's court.

For the purpose of procuring the drawing and attendance of a jury, the surrogate shall have all the powers of a justice of the supreme court specified in sections five hundred and twenty-seven and five hundred and twenty-eight of the judiciary law and also in relation to requiring the attendance of talesmen, and the clerk of the county of the surrogate shall, upon receiving the order of the surrogate, perform such duties in relation thereto as he is required to perform under a like order of a justice of the supreme court as specified in such sections.

Such jury shall be drawn in the presence of the surrogate, either in his office or in the office of the county clerk, and the minutes thereof shall be made in triplicate, and be signed by the surrogate and the county clerk, and one copy thereof filed in the office of the surrogate, one copy filed in the office of the county clerk, and one copy delivered to the sheriff of the county.

The names of the jurors so drawn shall be returned to the jury box by the county clerk, but if any such juror is again drawn for service in any court, the fact that he served as a juror in surrogate's court shall, upon his request, be sufficient excuse for not being required to again serve. In counties where by special act an officer other than the county clerk is designated to draw juries and perform corresponding acts, such officer shall cause the necessary jurors to be summoned and drawn as though a justice of the supreme court had made such order.

The provisions of law applicable to the summoning of jurors, the return of the sheriff, the fees of the sheriff and jurors and their payment, in supreme court, shall apply where jurors are drawn and summoned for service in surrogate's court; and where the county clerk is not a salaried officer, he shall be entitled for his services to such compensation as shall be audited by the board or body entitled to fix his compensation.

The number of days' service of each juror in surrogate's court shall be certified to the county clerk by the clerk of the surrogate's court. (Amended by Laws 1922, ch. 350; Laws 1924, ch. 136, § 1. In effect Sept. 1, 1924.)

Section 35 of the Surrogate's Court Act provides that where the surrogate is also county judge jury trials may be had with a jury drawn for the county court.

Page 168.

Addition of new subdivision under subject "Obtaining jury."

Special jury in New York County.

This section read with sec. 316, S. C. A. as amended in 1920 and 1922, gives the surrogate of New York county authority to grant a motion for a special jury under ch. 602, Laws of 1901, as amended. *In re Eno*, 118 Misc. Rep. 431, 193 N. Y. Supp. 759, *affd.* 194 N. Y. Supp. 931, 202 App. Div. 931.

Chapter 601, Laws 1901, is a special act for New York county and provides for making a special jury list and the procedure to obtain a special jury on demand. It is to be found in most of the consolidated law compilations under "Jurors and Jury Commissioners."

¶ 33 Page 177.

Continuation of subject of force and effect of decree.

A decree admitting a will to probate and directing the issuance of letters testamentary is a decree *in rem*, and if made by a court of competent jurisdiction, all the world is entitled to act upon the faith of it. *Manufacturers T. Co. v. U. S. Mortgage & T. Co.*, 122 Misc. Rep. 726, 204 N. Y. Supp. 105.

¶ 34 Page 186.

Continuation of subject "Serving certified copy decree."

The method of serving a decree as a foundation for contempt proceedings has been stated by Mr. Surrogate Foley (N. Y. Co.) in *Matter of Amy*, 116 Misc. Rep. 48, 189 N. Y. Supp. 367, as follows:

"Before the respondents can be adjudged to be in contempt, it must appear, not only that certified copies of the decrees with which they were required to make compliance were served upon them, but that such service was accompanied with due and proper demand for them to make compliance with the terms of the decrees. *Flor v. Flor*, 73 App. Div. 262, 76 N. Y. Supp. 813; *Delanoy v. Delanoy*, 19 App. Div. 295, 46 N. Y. Supp. 106; *Bradbury v. Bliss*, 23 App. Div. 606, 48 N. Y. Supp. 912; *Matter of Scheuer*, 161 App. Div. 525, 146 N. Y. Supp. 707; *Matske v. Matske*, 185 App. Div. 533, 173 N. Y. Supp. 244; Judiciary Law (Consol. Laws, c. 30) § 756.

It has been the invariable rule and policy of this court that the demand must be made by the trustee or other legally appointed representative in person, or, in the case of a corporation, by one of its duly authorized officers, or by the attorney in the original proceeding personally, or by a person especially authorized by the representative. This authorization must be in writing, acknowledged by the representative, and the original should be exhibited to the respondent at the time of demand. Fowler, S., *Matter of John Hartmann*, L. J. August 16, 1917; Cohalan, S., *Matter of Kirby*, L. J. March 24, 1915; *Matter of Varet*, L. J. October 19, 1917; Arnold, S., *Matter of Lawes*, L. J. January 11, 1897; Rollins, S., *Matter of Hanfling*, Surr. Decs. 1884, pp. 234 and 291."

¶ 36 Page 203.

Continuation of subject of paper of "testamentary character."

The mere fact that an absolute gift is intended to take effect in enjoyment at death does not require the gift to be testamentary in form.

Diefendorf v. Diefendorf, 132 N. Y. 100.

Ga Nun v. Palmer, 216 N. Y. 603.

Matter of Valentine, 122 Misc. Rep. 486, 204 N. Y. Supp. 284.

In *Gilman v. McArdle*, 99 N. Y. 451, Judge Rapallo says:

"It certainly must be in the power of a person to provide, either by will or contract, for matters of this description, and I can see no legal reason why he should be confined to a testamentary direction. It is only in respect to dispositions of property which are not to have any effect except upon the death of the owner and are revocable, that he is confined to a will. If they operate in praesenti, they are valid as contracts, even though they are not to be carried into execution until after the death of the party making them, or may be contingent upon the survivorship of another."

In the case of *Blaisdell v. Spencer*, 124 Misc. Rep. 302, 208 N. Y. Supp. 495, an agreement for care and support and in consideration therefor the title to certain property should vest in the plaintiffs was upheld as a valid contract. It was mentioned in that case that the agreement not upheld in the case of *Butler v. Sherwood*, 196 App. Div. 603, 188 N. Y. Supp. 242, affd. 233 N. Y. 655, was unilateral, and therefore more easily partook of the nature of a testamentary gift.

Page 204.

Continuation of subject "Conditional and contingent will."

In the *Matter of Poonarian*, 201 App. Div. 288, 194 N. Y. Supp. 511, the decree of the surrogate was reversed by a divided court which denied probate to a will made before a visit to Constantinople, and which referred to his death

during such absence, although he returned and lived many years thereafter. Upon appeal (234 N. Y. 329) the appellate division was reversed and the decree of the surrogate denying probate was affirmed.

A conditional will must contain the condition upon its face. *Matter of Webb*, 122 Misc. Rep. 129, 202 N. Y. Supp. 346; aff. 203 N.Y. Supp. 958.

Page 205.

Continuation of general subject of "Who may make a will."

This section does not change the general law (in other particulars) relating to making wills. That question was before the supreme court of Iowa (*Matter of Evans Will*, 188 Northwestern Rep. 774), where it was held that the general statute prohibiting the making of wills by infants was not changed.

Amendment to Section 15, Decedent Estate Law, affecting the rights of women.

§ 15. Who may make wills of personal estate.

Every person of the age of eighteen years and upwards, of sound mind and memory, and no others, may give and bequeathed his or her personal estate, by will in writing. (Amended by Laws 1923, ch. 233, § 1. In effect Sept. 1, 1923.)

The amendment eliminates the word "male" in the first line and the reference to females and makes the age eighteen years in both.

¶ 37 *Page 207*

Continuation of subject "Subscription may be by mark."

As the mark is the signature it is not necessary for the name to be written by another person in connection with making the mark. The witnesses see the mark made as the

signature or it is acknowledged to be the testator's signature. *Matter of Galicki*, 116 Misc. Rep. 100, 190 N. Y. Supp. 266.

Page 208.

Continuation of subject of signing at the end of the will.

The court in *Matter of Serveira*, 205 App. Div. 686, 200 N. Y. Supp. 464, said:

"The question of law then presented is whether the printed matter found on the third page of the will, consisting of the blank for the appointment of an executor and the phrase revoking former wills, is something that must be considered as a part of the instrument, and therefore requiring the signature of the testatrix to follow such printed matter, in order to meet the statutory command of a subscription at the end of the will. While it has been declared that by the words of the statute, 'at the end of the will,' the actual physical termination is intended, and not the place which the testator intended to be the end of the will (*Matter of O'Neil's Will*, 91 N. Y. 516), this view is dependent upon whether what follows the signatures constitutes material provisions. *Matter of O'Neil's Will*, *supra*; *Matter of Gibson's Will*, 128 App. Div. 769, 113 N. Y. Supp. 266; *Matter of Andrews' Will*, 162 N. Y. 1; *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409. In fact, it seems to be the accepted rule that, to deny that the subscription of a will is at the end thereof, material provisions must be found following the signature.

It is to be remembered that the act of writing the name of an executor in the printed blank was after due execution of the will on the second attempt, as held by the learned surrogate, and as borne out by the proof. This, therefore, was obviously not the act of the testatrix, and so the paper must be considered in the condition in which it was at the time of such due execution, and that shows that only the printed blank for the appointment of an executor, together with the clause of revocation of all former wills and the testimonium clause, followed the signature of the testatrix. All of this, in my opinion, can and should be disregarded."

A will is subscribed at the end even though there be explanatory or writing unimportant to a will following such signature. *Matter of McConihe*, 123 Misc. Rep. 318, 205 N. Y. Supp. 780.

Continuation of subject "Signed in or at end of attestation clause."

Where the witnesses write their names immediately above the attestation clause, and the testator immediately below it, the will is subscribed at the end. *Matter of Haber*, 118 Misc. Rep. 179, 192 N. Y. Supp. 616. See ¶ 62 Supplement.

Page 209.

Continuation of subject relating to subscribing or attesting witness.

Subscribing or attesting witnesses are those who are requested to sign and do sign as such. Where another person also signs the will, for instance, a notary, he is not thereby a subscribing witness and the rules applicable to taking testimony of a subscribing witness do not apply to him. *Matter of Serveira*, 119 Misc. Rep. 642, 197 N. Y. Supp. 893, affd. 200 N. Y. Supp. 464, 205 App. Div. 686.

Some wills executed under direction of laymen are attested by a notary public or justice of the peace as an affidavit or acknowledgment is attested. This method of signing by a witness has been held not to be signing as a witness, where the evidence did not show that such person was requested to sign as a witness. *In re McDonough*, 201 App. Div. 203, 193 N. Y. Supp. 734; aff. 205 App. Div. 686, 200 N. Y. Supp. 464.

Page 214.

Continuation of subject of publication of will.

The statute does not require any particular form of declaration in the execution of a will. It may even be by signs, or by actions and conduct from which it may be in-

ferred that the party is executing a paper which he understood to be his will.

Matter of Hunt, 110 N. Y. 278.

Matter of Menge's Will, 13 Misc. Rep. 553, 35 N. Y. Supp. 493.

Matter of Dybalski's Will, 199 App. Div. 677, 191 N. Y. Supp. 809, affd. 234 N. Y. 510.

Matter of Dotterweich, 205 N. Y. Supp. 580, 210 App. Div. 131.

New subdivision under subject "Publication of the will."

Publication by a person who does not speak English to an English speaking witness.

The method or means of communicating the declaration is not important, and it may be made in the only language the testator can speak with the intent and purpose that it should be communicated to the two witnesses.

Thus where one witness understands the language of the testator and translates it correctly to the other and the proved circumstances show from the acts and declarations of the testator that all three understood that the paper was a will and the witnesses were being asked to sign a will as witnesses, the paper should be probated. *Matter of Dybalski*, 199 App. Div. 677, 191 N. Y. Supp. 809; aff. 234 N. Y. 510.

Page 219.

Continuation of subject "Order of signing."

While it is a general rule that the witnesses sign in attestation of the signature of the testator as well as of the other formalities, and should therefore sign after the testator, the rule may be departed from under circumstances

which show a complete compliance with the statute in one transaction even though the testator signs last. *Matter of Haber*, 118 Misc. Rep. 179, 192 N. Y. Supp. 616.

¶ 38 Page 222.

Continuation of subject "Nuncupative will."

Statement made by a soldier as he was about to embark with the army for over-seas service, recognized as a nuncupative will. *Matter of Stein*, 119 Misc. Rep. 9, 194 N. Y. Supp. 909.

The purpose of an oral will made by a soldier may be proved by separate witnesses to whom the communication was made at different times. *Matter of Mason*, 121 Misc. Rep. 142, 210 N. Y. Supp. 901.

Page 224.

Continuation of subject "Mutual and reciprocal wills."

The rule in this state is that the execution of wills by two or more persons at the same time, each having knowledge of the provisions of the other, and each giving all his estate, or a definite sum, to the other, creates no legal obligation not to revoke the same; but, if such wills be executed pursuant to a contract therefor, then, in case either party revokes without notice, the other may compel a specific performance, or, if that be impossible, may recover damages for the breach of the contract, and such contract becomes absolutely irrevocable and enforceable in equity after the death of either. *Edison v. Parsons*, 85 Hun 263, 32 N. Y. Supp. 1036; *Id.*, 155 N. Y. 555; *Everdell v. Hill*, 27 Misc. Rep. 285, 58 N. Y. Supp. 447; *Blaine v. Richardson*, 193 N. Y. Supp. 618.

¶ 39 Page 225.

Continuation of subject of revoking a will.

This section (§ 34) applies not only to revoking the will itself, but to revoking or changing any part thereof. *Matter of Taylor*, 123 Misc. Rep. 826, 207 N. Y. Supp. 79.

Page 226.

Revocation by codicil.

The revocation of a codicil to a will does not necessarily carry with it a revocation of the will to which it was attached, but the will is not restored to its original form simply by the revocation of the codicil.

Osburn v. Rochester Trust & Safe Deposit Co.,
209 N. Y. 54.

Cunnion's Will, 201 N. Y. 123.

Matter of Danklefsen's Will, 171 App. Div. 339,
157 N. Y. S. 119.

In the *Osburn Case*, supra, the testatrix executed a codicil which modified her will by making an additional bequest of \$1,000 before providing for the disposition of her residuary estate. Subsequently the codicil was intentionally destroyed and revoked, but the will was preserved and admitted to probate. The Court of Appeals held that the will was entitled to probate, but, as to the condition created by the destruction of the codicil, said:

"When the codicil modified the will by providing for an additional legacy before creation of the residuary estate it modified and revoked the will to that extent. This revocation was consummated at the moment when the codicil was executed and published and thereafter the will was to that extent annulled. After this revocation had thus been consummated by the execution of the codicil the will could not be restored to its original form and tenor simply by the revocation of the codicil. A revocation of the revocation could not thus be accomplished. The effect of this is that the testatrix died intestate as to one thousand dollars." *Matter of Cable*, 123 Misc. Rep. 894, 206 N. Y. Supp. 502.

Continuation of subject "Revocation by a later will."

A will which makes a full disposition of all testator's property is inconsistent with the existence of any prior will and therefore amounts to a revocation of all wills previously executed. *Matter of Serveira*, 205 App. Div. 686, 200 N. Y. Supp. 464; *Ludlum v. Otis*, 15 Hun 410.

The execution of a later will may be proved when its only purpose is to show the revocation of a former will. *Matter of Williams*, 121 Misc. Rep. 243, 201 N. Y. Supp. 205.

Revocation by a later invalid will.

Under the provisions of section 34 of the Decedent Estate Law, a paper which is not signed at the end cannot legally revoke a prior will. Section 34 requires that the paper must be "executed with the same formalities with which the will itself was required by law to be executed," and among these formalities is the requirement of subscription at the end. The instrument of revocation, however, if good as a will, is good as a revocation. If invalid as a will, it is futile to revoke a prior testamentary disposition. *Matter of McConihe*, 123 Misc. Rep. 318, 205 N. Y. Supp. 780.

Page 231.

Continuation of subject "Revocation by writing on the original will."

Surrogate Slater (*In re Parsons*, 119 Misc. Rep. 26, 195 N. Y. Supp. 742), reviews the decisions and in a case where the writing evidencing revocations was across the face of the will, held that the will was revoked. Affd. 204 App. Div. 879, 197 N. Y. Supp. 935, affd. 236 N. Y. 580.

As also Surrogate O'Brien does in *Matter of Cronin*, 208 N. Y. Supp. 680, citing the following cases: *Matter of Barnes*, 76 Misc. Rep. 382, 136 N. Y. S. 940; *Matter of Field*, 109 Misc. Rep. 409, 178 N. Y. S. 778.

Page 233.

Continuation of subject "Revocation of duplicate will."

Probate was allowed where one duplicate was found in the safe deposit box of the testator, but the other could not be found, although it was shown to have been obtained by him from his lawyer. *Matter of Shields*, 117 Misc. Rep. 96, 190 N. Y. Supp. 562.

Page 235.

Continuation of subject "Revocation by marriage, etc."

In a case where the estate was small and it was all bequeathed to the infant children of a woman whose first husband was known by her to be alive, and there being no issue of the second marriage, it was held that the will was not revoked by the void marriage. *Matter of Flynn*, 118 Misc. Rep. 876, 195 N. Y. Supp. 248.

Page 234.

Continuation of subject of republishing will by a codicil.

The principle is well established that a codicil executed with the formalities required by the statute operates as a republication of a will in so far as it is not altered by such instrument.

Cook v. White, 43 App. Div. 388, 60 N. Y. S. 153, affd. 167 N. Y. 588.

Matter of Emmons, 110 App. Div. 701, 96 N. Y. S. 506.

Matter of Johnson's Estate, 105 Misc. Rep. 451, 174 N. Y. S. 493, affd. 188 App. Div. 954, 176 N. Y. S. 905.

Brown v. Clark, 77 N. Y. 369.

Matter of Campbell's Will, 170 N. Y. 84.

Matter of Lawler's Will, 195 App. Div. 27, 185 N. Y. S. 726.

Matter of Cable, 123 Misc. Rep. 894, 206 N. Y. Supp. 502.

Republishing codicil to republished will.

A codicil executed with the formality required by statute for the execution of wills operates as a republication of a will so far as it is not altered or revoked by the codicil, and, if the will which is thus republished had codicils added to it, the presumption arises, in the absence of a clear intent to the contrary, that the testator meant to ratify and confirm the will as amended by such codicils, and the codicils also are republished. *Bloodgood v. Lewis*, 209 N. Y. 95, 103; *Van Cortlandt v. Kip*, 1 Hill, 590; Jarman on Wills, vol. 1 (5th Amer. Ed.) chap. 7, § 5, pp. 358, 359; Williams on Executors, vol. 1 (6th Amer. Ed.) chap. 9, § 2, p. 256; Schouler on Wills, vol. 1 (6th Ed.) § 689, p. 789; *Matter of Cable*, 123 Misc. Rep. 894, 206 N. Y. Supp. 502.

Page 240.

Continuation of subject relating to obtaining wills from safe deposit boxes.

Where it is not alleged that the box contains a will or deed of a burial lot, the surrogate has no jurisdiction to order the safe deposit box opened for another purpose. *Matter of McDougall*, 197 N. Y. Supp. 735.

¶ 40 Page 240.

Amendment to Section 30, Decedent Estate Law authorizing filing with wills affidavits as to the competency of testator and due execution of the will.

§ 30. Reception of wills for safe keeping.

The clerk of every county in this state, the register of deeds in the city

and county of New York, and the surrogate of every county, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any last will or testament which any person shall deliver to them for that purpose, and shall give a written receipt therefor to the person depositing the same. *A subscribing witness to any last will or testament may make and sign an affidavit before any officer authorized to administer oaths setting forth such facts as he would be required to testify to in order to prove such will. Such affidavit may be written upon said will, or on some paper securely attached thereto, and may be filed for safe keeping with the last will or testament to which it relates. There may also be filed with such will affidavits of certified medical examiners, under the provisions of the insanity law, certifying that the maker of said will was of sound mind at the time of its execution, together with any facts supporting such opinions.* (Amended by Laws 1923, ch. 712, § 1. In effect Sept. 1, 1923.)

This amendment may be of some practical use in preserving a statement by a subscribing witness as to the facts of the execution, and a statement by a physician as to the mental capacity of the testator, but unless such affidavits are made evidence on probate, they can not be used directly.

¶ 43 Page 251.

Continuation of subject of what wills may be proved.

In connection with the amendment of section 23, Dec. Est. Law as to proof of wills executed without the state, section 22-a was added which contains similar provisions.

§ 22-a. Validity of wills executed without the state.

A will executed without this state in the mode prescribed by law, either of the place where executed or of the testator's domicile, shall be deemed to be legally executed and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided, such will is in writing and subscribed by the testator. (Added by L. 1919, ch. 294. In effect May 3, 1919.)

Under this section a holographic will without witnesses executed without the state, could be probated in this state provided such will could be probated under the laws of the place where it was executed. *Matter of Tinker*, 124 Misc. Rep. 723, 209 N. Y. Supp. 589.

Amendment to sec. 25, Dec. Est. Law, correcting obsolete reference.**§ 25. Application of certain provisions to wills previously made.**

The last two sections apply only to a will executed by a person dying after April eleventh, eighteen hundred and seventy-six, and they do not invalidate a will executed before that date, which would have been valid but for the enactment of sections one and two of chapter one hundred and eighteen of the laws of eighteen hundred and seventy-six, except where such a will is revoked or altered, by a will which those sections rendered valid, or capable of being proved as prescribed in article *nine of the surrogate's court act*. (Amended by Laws 1924, ch. 128, § 1. In effect April 12, 1924.)

By an amendment to section 48, Dec. Est. Law made by chap. 164, Laws of 1924, section 314, Sur. Ct. Act (the section of definitions) is made applicable to sections 23 to 25, both inclusive, and to sections 42 to 47, both inclusive.

Page 253.

Addition to subject of "Probate of will of citizen domiciled in Great Britain."**§ 138. Probate of wills of citizens of the United States domiciled in the United Kingdom of Great Britain and Ireland.**

The last will and testament of any person being a citizen of the United States, or, if female, whose father or husband previously shall have declared his intention to become such citizen, who shall have died, or hereafter shall die, while domiciled or resident within the United Kingdom of Great Britain and Ireland, or any of its dependencies, which shall affect property within this state and which shall have been duly proven or *established* within such foreign jurisdiction, shall be admitted to probate in any county of this state wherein shall be any property affected thereby, upon filing in the office of the surrogate of such county, and there recording, a copy of such last will and testament, certified under the hand and seal of a consul-general of the United States resident within such foreign jurisdiction, together with the proofs, *if any*, of the said last will and testament, made and accepted within such foreign jurisdiction, certified in like manner. Letters testamentary on such last will and testament shall be issued to the persons named therein to be executors and trustees, or either thereof, or to those of them who, prior to the issuance of such letters, by formal renunciation, duly acknowledged or proven, and duly certified, shall not have renounced the trust therein devolved upon them; pro-

vided, that before any such will shall be admitted to probate in any county of this state, the same proceedings shall be had in the surrogate's court of the proper county as are required by law upon the proof of the last will and testament of a resident of this state who shall have died therein; except that there need be cited upon such probate proceedings only the beneficiaries named in such will. (§ 138 Sur. Ct. Act amended by Laws 1925, chap. 576. In effect Sept. 1, 1925.)

Whether a will of a citizen domiciled in Great Britain could be proved in this state by filing a certified copy of the will and duly attested copy of the proceedings, depended whether the will had been "there admitted to probate." The addition of the words "or established" to section 159, Sur. Ct. Act, did not have the effect of incorporating them in this section (138) and therefore probate in common form had in England did not give the will the benefit of this section. *Matter of Eighmie*, 121 Misc. Rep. 750, 201 N. Y. Supp. 876; *Matter of Connell*, 221 N. Y. 190.

But the amendment made in 1925 omitted the requirement that the will should be "there admitted to probate," and substituted the words "or established," thus making this section agree with section 159, Sur. Ct. Act, ¶ 111, page 570.)

¶ 44 Page 254.

Amendment to Section 139, Sur. Ct. Act, regarding persons who may propound will.

§ 139. Who may propound will; contents of petition.

A petition for the probate of a will may be presented by:

Any person designated in the will as executor, devisee, legatee, testamentary trustee or guardian or by the general guardian of any infant legatee or devisee;

A creditor of the decedent, or any other person interested in the estate;

Any party to an action brought, or about to be brought, in which action the decedent, if living, would be a proper party.

The surrogate's court may direct the public administrator or county treasurer to present a petition if a will has been filed in the surrogate's office for over sixty days and no other person who is entitled to petition for its probate has done so.

Such petition, in addition to the general allegations contained in section fifty-one of this Act, shall describe such will and any other will of the same testator on file in the surrogate's office, and set forth the names and post office addresses, so far as they can be obtained with due diligence, of all the devisees, legatees and beneficiaries named in said will, or in any other will so filed.

(Amended by Laws 1923, ch. 528. In effect Sept. 1, 1923.)

¶ 48 Page 268.

Amendment to Section 141, Sur. Ct. Act, relating to production of original will.

§ 141. Witnesses to be examined; proof required.

Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the state, and competent and able to testify. Where the will is on file in a court or public office, of another state of the United States, or in a court, or public office, of a foreign country, and under the laws of such state or country, the will cannot be removed, the surrogate may *issue a commission to take the testimony in the matter*; or where the will is brought to the surrogate's court by a representative of a public office of a state or country, the surrogate may take the testimony in the matter and permit said representative to return the will to said state or country, and the testimony so taken and the decree admitting a will upon such testimony shall have the same force and effect as though the will had been filed or had remained in the surrogate's office. Before a nuncupative will is admitted to probate, its execution and the tenor thereof must be proved by at least two witnesses. The proofs must be reduced to writing. Any party to the proceeding, *before filing objections to the probate of said will*, may request the oral examination of the subscribing witnesses *thereto* and may examine such witnesses and any other witness produced by the proponent before the surrogate, *without first filing objections to the probate of such will*. (Amended by Laws 1925, ch. 575. In effect Sept. 1, 1925.)

This amendment changes the established law and practice concerning probating wills which can not be produced or filed in the surrogate's office. See pages 269 and 270 (4th Ed.). The former requirement of section 150, Sur. Ct. Act, that all wills must be filed in and remain in the surrogate's office has been changed (¶ 74) so that the requirement no longer exists where the will can not be removed from the foreign jurisdiction.

The amendment of 1925 seems a useless repetition of the provision to have an oral examination of witnesses before filing objections. Special provision is made concerning wills on file in the United Kingdom. See ¶ 43.

¶ 49 Page 273.

Amendment to Section 142, Surrogate's Court Act, relating to absent witnesses.

§ 142. Absent witnesses to be accounted for; dispensing with testimony; commission; proof of handwriting.

The death, absence from the state, or incompetency by reason of lunacy, or otherwise of a subscribing witness required to be examined as prescribed in this or the last section, or the fact that such witness cannot, with due diligence, be found within the state, or cannot be examined by reason of his physical or mental condition may be shown by affidavit or other competent evidence, and when so shown to the satisfaction of the surrogate, the surrogate may by *the decree or by an order in writing, or by an order entered in the minutes* dispense with his testimony; or in a case where such witness is absent from the state and it is shown that his testimony can be obtained with reasonable diligence, the surrogate may, in his discretion, and shall upon the demand of any party, require his testimony to be taken by commission. Where the testimony of a subscribing witness has been dispensed with as provided in this section, and one subscribing witness has been examined, the will may be admitted to probate upon the testimony of such subscribing witness alone.

If all the subscribing witnesses to a written will be dead, or incompetent by reason of lunacy or otherwise, to testify, or unable to testify, or are absent from the state and their testimony has been dispensed with as provided in this section, or if a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, or was not present with the other witness at the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action. (Amended by Laws 1922, ch. 653. In effect April 13, 1922.)

Order or record of dispensing with testimony necessary.

A strict interpretation of the section would seem to make necessary a record of dispensing with testimony of a witness who is dead. There seems to be no distinction between

failing to take the testimony and the consequent dispensing with the testimony as to any of the witnesses mentioned in the section, and therefore it must appear in the record that the testimony of a witness not sworn has been dispensed with.

Dispensing with testimony.

A record of dispensing with testimony should be carefully made as provided in this section. It is not sufficient to show that a witness is dead, absent from the state or incompetent to testify to make good proof by one witness, but the surrogate must by the decree, by an order in writing or entered in the minutes formally dispense with the testimony. This is necessary even though it is shown that a witness is dead.

¶ 50 Page 278.

Continuation of subject of taking deposition without the state.

Granting or refusing a commission to take the testimony of a witness without the jurisdiction ordinarily rests in the sound discretion of the court at special term.

Courts should not aid parties in their manifest purpose of delaying trial beyond the term when it may be tried, and so, where moving papers on an application to take the deposition of a material witness outside the jurisdiction made no satisfactory explanation for delaying the application until the case was on the day calendar for trial, and showed no substantial grounds for taking the deposition at all, the application should have been denied, where there were strong indications that it was made to prevent trial at that term. *Matter of Van de Walker*, 207 App. Div. 161, 201 N. Y. Supp. 722; *Powell v. Schoellkopf*, 197 App. Div. 471, 188 N. Y. Supp. 297.

¶ 51 Page 281.

Continuation of subject "Presumption and evidence of revocation."

Where the last pages of a will had been removed for the purpose of making some changes, and had been lost or destroyed before the changes were made and the new will executed, the surrogate, upon proof of the original will by copy and otherwise, admitted the will as originally executed. *Matter of Dorrity*, 118 Misc. Rep. 725, 194 N. Y. Supp. 573.

Not every lost or destroyed will may be probated in Surrogate's Court.

The Surrogate's Court has jurisdiction to probate a will which was in existence at the death of the testator and which was lost or destroyed by accident or design after death, or which was fraudulently destroyed either before or after death, but there is no authority to probate a will which was lost or destroyed by accident or design before death. Apparently if a will is burned in a fire before the death of testator it can be proved only in Supreme Court under sections 200-204, Dec. Est. Law. There seems to be no good reason why the Surrogate's Court should not have jurisdiction in all of such cases. *Matter of Dorrity*, 118 Misc. Rep. 725, 194 N. Y. S. 573.

¶ 52 Page 284.

Continuation of subject relating to demand for trial with jury.

The demand for a jury trial need not be embodied in the objections or be written on the same paper, if filed at the same time as the objections. It appears also that amended and corrected objections demanding a trial with jury may be filed seasonably. *Matter of Morrow*, 194 N. Y. Supp. 78; *Matter of Price*, 118 Misc. Rep. 544, 194 N. Y. Supp. 79.

Page 285.

Continuation of subject "Who may file objections to probate."

Objections to the probate of a will may not be filed by one who would derive no financial benefit should the will be set aside. *Matter of Hoyt's Will*, 55 Misc. Rep. 159, 106 N. Y. Supp. 359, affirmed 122 App. Div. 914, 107 N. Y. Supp. 1130, affirmed 192 N. Y. 538.

A separation agreement may by its terms release the interest of a wife in the property of her husband. *Titus v. Bassi*, 182 App. Div. 387, 169 N. Y. Supp. 49; *Matter of Hagen*, 119 Misc. Rep. 770, 198 N.Y. Supp. 345, aff. 206 App. Div. 682, 199 N. Y. Supp. 948.

A wife who has signed a separation agreement releasing all her rights against her husband's estate, and has received the stipulated sum, and has released her dower in his real estate, is not a "person interested" on the probate of his will, and can not file objections to its probate. *Matter of Klein*, 121 Misc. Rep. 568, 201 N.Y. Supp. 367.

Page 287.

Amendment to Section 148, Surrogate's Court Act, relating to contents of notice of contest.

§ 148. Notice to legatees and devisees of objections filed.

Whenever objections are filed to the probate of a will, the proponent shall file a notice stating the name of the testator, that his last will and testament has been offered for probate, the name and post office address of the proponent, and of each legatee, devisee or other beneficiary, who has not appeared by attorney, and the names of any other persons directed by the surrogate to be notified. Such notice shall be served on each of the parties therein named in such manner and within such time as the surrogate shall direct, which notice shall have the additional statement included in or endorsed thereon that objections have been filed to the probate of such will and that the same will be heard on a day or at a term of court therein stated. Proof of due service of such notice shall be made and filed in the surrogate's office, and any decree in the proceedings shall not affect the right or interest of any such person unless he shall have been so notified. (Amended by Laws 1922, ch. 653, § 1. In effect April 13, 1922.)

The new matter in italics is taken from sec. 146.

Sometimes a notice of contest is served by mail following the procedure in section 146 (§ 77) provided for giving informal notice to legatees not cited. As the effect of the notice of contest is to make the person notified a party to the proceeding and to bind him by the decree, care should be taken that application is made to the surrogate for definite instructions as to the method and time of service, either entered in the minutes or shown by an order.

A legatee or devisee served with such notice becomes thereby a party to the proceeding. *Matter of Vail*, 120 Misc. Rep. 430, 198 N. Y. Supp. 661.

Addition of subject of right to require proponent to produce witnesses.

Persons who have been named in a will and have been served with notice pursuant to section 148, Sur. Ct. Act, are parties to the contested probate proceeding and may be examined by an adverse party under section 288, Civ. Prac. Act.

But the proponent can not be required to produce other persons for examination upon notice. *Matter of Dooper*, 124 Misc. Rep. 411, 208 N. Y. Supp. 820.

Page 288.

New subject relating to objections to probate.

Objections to probate, dismissing.

A surrogate can not strike out the objections and answer of a contestant in probate proceedings, or restrain him from further contest because of a prior agreement made by him not to contest the will. *Matter of Hearne*, 171 N. Y. Supp. 984.

¶ 53 *Page 291.*

New subject under general topic of trial with jury.

Closing argument.

The proponent has the right to close the argument to the jury. *Matter of Burnham*, 201 App. Div. 621, 194 N. Y. Supp. 811. Aff. 234 N. Y. 475.

Continuation of subject of submitting issues to jury on probate.

A question submitted to the jury as to execution should not be "was the paper duly executed" etc., but should recite the necessary requirements of a will duly executed. *Matter of Pecorano*, 207 N. Y. Supp. 892.

Page 292.

Continuation of subject "Direction of verdict."

Where the only issue is fraud or undue influence and the jury fails to agree, the surrogate may, if in his judgment he would set aside a verdict finding such fraud or undue influence, direct a verdict for proponents. *Matter of Price*, 119 Misc. Rep. 19, 194 N. Y. Supp. 842. Aff. 204 App. Div. 252, 197 N. Y. Supp. 778, aff. 236 N. Y. 656.

¶ 54 *Page 296.*

Continuation of subject of release of interest by legatee for the purpose of testifying.

Legacies renounced for the purpose of legatees becoming competent to testify become a part of the general estate and will pass under a residuary clause. *Matter of Southmayd*, 124 Misc. Rep. 647, 207 N. Y. Supp. 558.

¶ 55 Page 301.

Correction of printing error.

Under the heading "Attorney or draughtsman," read the third line after the first.

¶ 56 Page 306.

Add to paragraph "Declarations competent to show state of mind."

Matter of Burnham, 201 App. Div. 621, 194 N. Y. Supp. 811, *affd.* 234 N. Y. 475.

Page 310.

Continuation of general subject of evidence of incompetency from court records.

An order of commitment to an asylum made by the Supreme Court is *prima facie* evidence of insanity at the time it was made.

Sporza v. German Sav. Bank, 192 N. Y. 8, 33.

Morrell v. Dodd, 189 N. Y. 546.

Matter of Prentice, 110 Misc. Rep. 456, 181 N. Y. Supp. 679.

Matter of Brobst, 112 Misc. Rep. 66, 182 N. Y. Supp. 532.

Insanity Law, § 80.

¶ 59 Page 320.

Continuation of general discussion of undue influence and its proof.

It is no proof of undue influence that one requested or even urged a certain disposition of property, provided the acts were those of persuasion and not coercion. *Matter of Bogardus*, 198 App. Div. 399, 190 N. Y. Supp. 535.

¶ 61 *Page 330.*

Continuation of subject of proof of knowledge of contents where one subscribing witness is dead and the will is signed by mark.

There must be evidence from which the surrogate or the clerk can find that the testator knew the contents of the will at the time it was executed, and proof that he told others about its provisions afterwards is not sufficient or competent.

In the case of an illiterate testator who can not read and write there must be more evidence than the mere fact that he affixed his mark to the will. *Matter of Regan*, 206 App. Div. 403, 201 N. Y. Supp. 431.

¶ 62 *Page 333.*

Continuation of subject of effect of attestation clause.

In the *Matter of Eyett*, 124 Misc. Rep. 523, 209 N. Y. Supp. 251, the will was not signed by testator except as he wrote the attestation clause containing his name. One witness was dead and the other witness was mentally incompetent to testify. The Surrogate admitted the will, saying that section 142, Sur. Ct. Act had no application because it referred to cases where the subscribing witnesses were produced and that the rule was relaxed in cases of holographic wills. See ¶ 37 Supplement. As to proof of holographic will see ¶ 38, page 220.

¶ 63 *Page 335.*

Continuation of subject "Decree of probate."

Surrogate must be satisfied.

The law requires that the surrogate "be satisfied with the genuineness of the will and the validity of its execution."

This puts a duty upon the surrogate that is not put on all judges of courts of record. No default in appearing and no consent of the interested parties gives the Surrogate jurisdiction to make a decree of probate until he becomes satisfied by evidence that the statute has been complied with. Even if no objections are filed the surrogate must refuse probate to a will which does not comply with the requirements. *Matter of De Witt*, 198 N. Y. Supp. 92; *Matter of Shaper*, 86 Misc. Rep. 577, 149 N. Y. Supp. 468.

Right to probate purely statutory.

A disposition of property by will is not an inherent right, but it is a right conferred upon the individual by statute and certain definite requirements have been made by the legislative body in order to constitute due execution, and, though it may work hardship in particular cases, it is not for the courts to set aside and ignore the law pertaining to due execution of testamentary instruments. *Matter of Crill*, 124 Misc. Rep. 134, 207 N. Y. Supp. 775.

Page 342.

Continuation of subject "Decree of probate."

Proof of will written in short-hand.

In England wills written in short-hand have been admitted to probate. In such cases the stenographer writes and reads the will and it is executed before him and another person as witnesses. A certified copy is attached to the original when filed. Where great haste is required to prevent intestacy, it might be a useful method.

Page 343.

Continuation of subject of failure of recollection of subscribing witness.

A subscribing witness who has forgotten the transaction

may, if possible, refresh his recollection by means of conversations with others or reference to memoranda, and if then his testimony is clear and convincing and trustworthy, his testimony may be sufficient to establish the will where the other witness is dead and there is a full and complete attestation clause. *Matter of Regan*, 206 App. Div. 403, 201 N. Y. Supp. 431.

¶ 64 Page 344. See ¶ 39. Revocation.

Continuation of subject "Effect of alterations appearing on the face of the will."

An alteration otherwise ineffective as a revocation may become a revocation where it is referred to in a codicil as having been made. *Matter Regnault*, 120 Misc. Rep. 663, 202 N. Y. Supp. 270.

Where the alterations are many and material and there is no evidence obtainable as to when they were made, or whether all were made at the same time or by the same person, the paper will be rejected. *Matter of Hamlin*, 208 N. Y. Supp. 799.

¶ 65 Page 350.

Correction in printing error.

Reference to ¶ 59 should be ¶ 39.

¶ 67 Page 357.

Continuation of general subject of effect of probating a will which violates a prior contract.

The enlarged jurisdiction of the Surrogate's Court does not cover granting relief in such cases, but an action should be had in equity to enforce the contract. *Rochester Trust & Safe Dep. Co. v. Brown*, 116 Misc. Rep. 184, 189 N. Y. Supp. 678.

Agreement to make a will can not be given effect in proceeding to probate another will. *Matter of Lally*, 206 N. Y. Supp. 690, 210 App. Div. 757.

Continuation of general subject of decree of probate.

An unrevoked will may be probated where there is a later will.

A later will which does not revoke a former will must be construed with the former will as one instrument, and both are entitled to probate.

Herzog v. Title G. & T. Co., 177 N. Y. 86.

Hard v. Ashley, 117 N. Y. 66.

Matter of Sweeney, 120 Misc. Rep. 663, 200 N. Y. Supp. 328.

It must be remembered, however, that a later will which disposes of the whole estate leaves nothing to be acted upon by the prior will and it is practically revoked. See subject "Revocation by a later will," ¶ 39.

¶ 68 *Page 363.*

Continuation of subject "Proceeding to obtain construction of will."

Jurisdiction to construe will in special proceeding.

Where there are children born after the making of a will, the Surrogate's Court has jurisdiction to construe the will to determine whether or not under section 26 of the Dec. Est. Law the children are entitled to share in the estate, and the uncertainty as to the proper administration of the estate without such construction is sufficient reason for entertaining such special proceeding. *Matter of Dick*, 117 Misc. Rep. 635, 191 N. Y. Supp. 762.

¶ 69 Page 368.

Continuation of subject relating to ascertaining intention of testator.

Where a gift of the residuary estate was made to each of five persons share and share alike, the use of the fraction one-fourth will be disregarded as plainly contrary to the intention of the testator. *Matter of Vismar*, 117 Misc. Rep. 554, 191 N. Y. Supp. 752.

Page 369.

Continuation of subject relating to extrinsic evidence in construing wills.

Where a testatrix devised all her real estate in a certain place, and she owned only stock in a real estate corporation, evidence was allowed showing that she intended to give the stock. *Matter of Cartledge*, 118 Misc. Rep. 131, 192 N. Y. Supp. 838.

In *Rezzemini v. Brooks*, 204 App. Div. 157, 197 N. Y. Supp. 872, the court said:

“To ascertain the intention of the testatrix, extraneous and parol proof is admissible, not ‘to supply, contradict, enlarge, or vary the written words’ (*Brown v. Quintard*, 177 N. Y. 75, 83), but to reveal ‘the situation of the testator’s property at the time of his death, the condition of the beneficiaries and the circumstances surrounding the execution of the will’ (*Furniss v. Cruikshank*, 230 N. Y. 495, 501), to consider the surrounding circumstances that culminated in the testamentary act’ (*Collister v. Fassitt*, *supra*, 163 N. Y. at page 284).

“While we may not consider any declaration of the testatrix dehors the language of the will, as to what she intended by the use of the language in question, we may consider the relevant and competent surrounding facts and circumstances. We may consider what facts she knew at the time as to her own property and as to her son’s condition, physical and financial, present and prospective. We may consider her known attitude toward her actual beneficiaries and her natural beneficiaries. We may learn every fact essential to know, in order, if possible, to understand the general situation surrounding her at the time, and to appreciate her general attitude toward the scheme

disclosed in the will; but we are limited to facts and circumstances. We cannot consider her words of intention directly interpretative of the very ambiguity which is under consideration."

This case was reversed on the law, 236 N. Y. 184.

Rules for construing ambiguous will are: Testator's intent must be given effect if ascertainable; bequest or devise in clear or unambiguous language cannot be cut down by subsequent language not equally clear; and all parts of will must, if possible, be harmonized and given effect. *Matter of Weiss*, 124 Misc. Rep. 413, 209 N. Y. Supp. 129.

Page 371.

Continuation of general subject of construction of will.

Giving effect to word "surviving."

This word cannot be rejected, as meaningless or repugnant.

Matter of Baer, 147 N. Y. 348.

Matter of Buechner, 226 N. Y. 440.

Matter of Einstein, 114 Misc. Rep. 452, 186 N. Y. S. 931.

Matter of McKim, 115 Misc. Rep. 720, 185 N. Y. S. 767.

Matter of Kissam, 115 Misc. Rep. 724, 186 N. Y. S. 263.

Matter of Flint, 118 Misc. Rep. 134, 192 N. Y. S. 630.

Matter of Valentine, 119 Misc. Rep. 442, 196 N. Y. S. 398.

Matter of Hicks, 119 Misc. Rep. 6, 194 N. Y. S. 846.

Matter of Fox, 123 Misc. Rep. 288, 205 N. Y. S. 153.

Matter of Parsons, 124 Misc. Rep. 394, 207 N. Y. Supp. 772.

Words of inheritance not necessary.

Where there is an apparent intention to dispose of the entire estate, the use of the word property includes real and personal estate. Real Prop. Law, § 240, subd. 1, id. § 245; Dec. Est. Law, § 14; Genl. Constr. Law, § 38. *Matter of Seif*, — App. Div. —, 209 N. Y. S. 341.

¶ 74 Page 381.**Addition to subject relating to retaining original wills in Surrogate's office.**

Where the will of a non-resident who died within the state leaving personal property within the state, has been offered for probate in this state, all parties cited and the will denied probate, it will not be sent to the state of the residence of the deceased for another attempt at probate. *Matter of Spang*, 118 Misc. Rep. 597, 194 N. Y. Supp. 77.

Amendment to Section 150, Surrogate's Court Act, relating to recording wills.**§ 150. Wills to be recorded and retained; exception.**

Every will admitted to probate, together with the decree, order or judgment admitting it to probate, shall be recorded in the proper surrogate's court. Where a written will is proved, it must be filed and remain in the surrogate's office, *except in matters where the will is on file in a court or public office of another state or country under the laws of which it cannot be removed*. But when it shall be shown, by affidavit or otherwise, to the satisfaction of the surrogate, that the decedent left real or personal property in another state or territory of the United States or in a foreign country, and that the laws of such state, territory, or country require the production of the original will before the provisions thereof become effective, the surrogate may, at any time after probate, and upon such notice to the parties interested in the estate as he may think proper, cause any original will remaining on file in his office to be sent by post or otherwise to any court which, or to any officer of such state, territory or country who, under the laws thereof, is empowered to receive the same for probate, or may deliver such will to any person interested in the probate thereof in such state, territory or country, or to his representative, upon such terms as he shall think proper for the preservation of the

will and the protection of other parties interested in the estate. (Amended by Laws 1922, ch. 653, § 1. In effect April 13, 1922.)

This amendment has been made, excepting foreign wills from the requirement that they be filed in and recorded in the surrogate's office as part of the proceeding for probate, because by a prior amendment to section 141, Sur. Ct. Act, such wills may now be admitted to probate in this state. See ¶ 48, Suppl.

Page 384.

Record of certain wills heretofore proved; how far evidence.

By an amendment to section 153, Sur. Ct. Act by Laws 1925, ch. 579, in effect Sept. 1, 1925, the age of a paper entitled to be admitted in evidence was reduced from thirty to twenty years.

¶ 75 *Page 384.*

Amendment to Section 44, Dec. Est. Law, providing for recording of will making devise, or petition and letters where property passes by descent.

§ 44. Recording will proved in another state or foreign country.

Where real property situated within this state, or an interest therein, is devised or made subject to a power of disposition by a will in writing subscribed by the testator, duly executed in conformity with the laws of this state or of the place where executed or of the testator's domicile, and admitted to probate without the state and filed or recorded in the proper office as prescribed by the laws of the state, territory or foreign country where the will was probated, *or if such real property is cast by descent through lack of a devise thereof or of a power of disposition thereof by such a will in writing, a copy of such will or of the record thereof and of letters testamentary granted thereon or of the record thereof* and of the proofs or of the records thereof, or if the proofs are not on file or recorded in such office, of any statement on file or recorded in such office, of the substance of the proofs, *or a copy of a petition for letters of administration or of the record thereof and of letters of administration granted thereon or of the record thereof*, authenticated as prescribed in section forty-five of this chapter, or if no proofs

and no statement of the substance of the proofs be on file or recorded in such office, a copy of such will or of the record thereof, authenticated as prescribed in said section forty-five, accompanied by a certificate that no proofs or statement of the substance of the proofs of such will, are or is on file or recorded in such office, made and likewise authenticated as prescribed in said section forty-five, may be recorded in the office of the surrogate of any county in this state where such real property is situated; and such record in the office of such surrogate or an exemplified copy thereof shall be presumptive evidence of such will and of the execution thereof *and of the letters testamentary granted thereon and of such petition for letters of administration and of the letters of administration granted thereon* in any action or special proceeding relating to such real property. (Amended by Laws 1925, ch. 605. In effect April 11, 1925.)

Page 387.

Amendment to sec. 45, Dec. Est. Law, concerning authentication of papers, petition and letters from another state or foreign country to be used in this state.

§ 45. Authentication of papers from another state or foreign country for use in this state.

To entitle a copy of a will admitted to probate *or a copy of a petition for letters of administration or of letters testamentary or of letters of administration, granted in any other state or in any territory of the United States,* and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, *petition,* letters, proofs or statement, to be recorded or used in this state as provided in section forty-four of this chapter, such copy must be authenticated by the seal of the court or officer by which or whom such will was admitted to probate or such letters were granted, or having the custody of the same or of the record thereof, and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer if any; and must be further authenticated by a certificate under the great or principal seal of such state or territory, and the signature of the officer who has the custody of such seal, to the effect that the court or officer by which or whom such will was admitted to probate or such letters were granted, was duly authorized by the laws of such state or territory to admit wills to probate or to grant letters testamentary or of administration and to keep the same and records thereof; that the seal of such court or officer affixed to such copy is genuine, and that the officer making such certificate under such seal of such state or territory verily believes that each of the signatures attesting such copy is genuine; and to entitle any certificate concerning proofs accompanying the copy of the will or of the record so authenticated, to be recorded or used in this state, as provided in said sec-

tion, such certificate must be under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under such great or principal seal of such state or territory, and the signature of the officer having the custody thereof, to the effect that the seal of the court or officer affixed to such certificate concerning proofs is genuine, and that such officer making such certificate under such seal of such state or territory, verily believes that the signature to such certificate concerning proofs is genuine. To entitle a copy of a will admitted to probate or a copy of a *petition for letters of administration* or of letters testamentary, or of letters of administration, granted in a foreign country, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, *petition*, letters, proofs or statement, to be recorded or used in this state, as provided in said section, such copy must be authenticated in the manner prescribed by the laws of such foreign country, and must be further authenticated by a certificate of a judge of a court of record or by the chief officer of the department of justice of such foreign country to the effect that such authentication is in conformity with the laws of such foreign country, and that the court or officer by which or by whom such will was so admitted to probate, or such letters were granted, was duly authorized by the laws of such foreign country to admit wills to probate, or to grant letters testamentary or of administration, and to keep the same and records thereof; and the signature and official character of such judge of such court of record or of such chief officer of the department of justice shall be attested by a consular officer of the United States, resident in such foreign country, under the seal of his office; and to entitle any certificate concerning proofs accompanying the copy of the will or of the records so authenticated, to be used and recorded in this state, as provided in said section, such certificate concerning the proofs must be similarly authenticated and attested. (Amended by Laws 1925, chap. 605. In effect April 11, 1925.)

Page 388.

Addition of sec. 159, U. S. Rev. Statutes, giving the United States Statute showing requirements for exemplification of wills and records.

“The acts of the legislature of any state or territory or of any country subject to the jurisdiction of the United States shall be authenticated by having the seals of such states, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice

or presiding magistrate that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they had by law or usage in the court of the state from which they are taken."

Section 159 U. S. Revised Statutes.

The foregoing exemplification is more simple than the exemplification required under sections 44 and 45 of the Decedent Estate Law and should not be used for the purposes of filing a foreign will in the surrogate's office to make record title to real estate or as a foundation for issuing ancillary letters. Sections 44 and 45 require specific and detailed information upon some points to be furnished to the surrogate to enable him to properly act. It is not simply the record of a judicial proceeding or of a court that the surrogate requires but it is rather specific information concerning the action of a foreign court and its jurisdiction in regard to a particular matter.

¶ 77 *Page 396.*

Continuation of subject of appointing a substituted executor.

Where authority is given to acting executors or executor to appoint a substitute, there seems to be no provision in the statute covering the procedure to effectuate the appointment. *Matter of Tilden* (Mac Lean), 118 Misc. Rep. 729, 194 N. Y. Supp. 565.

Page 398.

Continuation of subject of security to be given by trustee.

Bond of resident testamentary trustee under foreign will duly recorded.

Where a foreign will affecting real property in the county has been duly recorded in the surrogate's office as provided by section 44, Dec. Estate Law, the surrogate has authority

to fix the amount of the bond of the resident trustee. *Matter of Walker*, 117 Misc. Rep. 805, 191 N. Y. Supp. 676.

¶ 79 Page 401.

Amendment to Section 167, Surrogate's Court Act, relating to how a testamentary trustee qualifies.

§ 167. How testamentary trustee shall qualify.

A testamentary trustee named in a will or appointed pursuant to a power contained in a will or appointed by the surrogate shall, before exercising the duties of his office, qualify by taking and filing with the surrogate an oath of office and such bond as may be required by the surrogate, *and he shall also file an instrument acknowledged or proved, and duly certified designating the clerk of the surrogate's court and his successor in office, on whom service of any process issuing from the surrogate's court may be made in like manner and with like effect as if it were served personally upon himself, whenever such person can not be found and served within the state of New York, after due diligence used.*

A trust company or other trustee exempted by law from taking an oath of office, and filing a bond, shall file a consent to accept such appointment duly executed and acknowledged. (Amended by Laws 1923, ch. 274, § 1. In effect Sept. 1, 1923.)

This amendment makes it compulsory on the surrogate to require and on each qualifying testamentary trustee to file a designation of the clerk to receive service for him. The surrogate heretofore could require such designation before letters were issued in cases where he thought it necessary under section 95, Sur. Ct. Act (¶ 105).

There is a fair question whether the amendment includes a trust or banking company, such company being a corporation which can always be served with process.

¶ 80 Page 404.

Amendment to Section 168, Surrogate's Court Act, relating to when a successor trustee may be appointed.

§ 168. Appointment of successor.

When all the persons named in a will as testamentary trustees die prior to the

probate of the will, or by an instrument in writing renounce the appointment, or when no testamentary trustee is named in a will to execute a trust created therein, or when all the testamentary trustees die or become incompetent, or are by a decree of the surrogate's court removed or allowed to resign, or where one of two or more persons named in a will as testamentary trustees dies prior to the probate of the will, or by an instrument in writing, renounces his or their appointment, or where one of two or more testamentary trustees dies or becomes a lunatic, or is by decree of the surrogate's court removed or allowed to resign, and the trust has not been fully executed, the surrogate's court may appoint a trustee or successor or successors, unless such appointment would contravene the express terms of the will, or there is a trustee in office, unless all the beneficiaries waive such appointment in writing, or *where a testamentary trustee has been named in such will to succeed such testamentary trustee and is not incapacitated or otherwise disqualified from acting as such testamentary trustee*. Until a successor is appointed the remaining trustee or trustees may proceed and execute the trust. The trustee or successor may be appointed upon the application of any person interested and upon notice to such persons as the surrogate may designate. (Amended by Laws 1922, ch. 456, § 1. In effect Sept. 1, 1922.)

Page 410.

Continuation of subject relating to termination of trust where trustee has personal discretion.

Where the decedent invests his trustee with a personal discretion as to the manner in which the trust fund shall be disbursed, and that discretion is so personal that it will not pass to a substituted trustee, the trust terminates on the death of the trustee. *Matter of Jones*, 119 Misc. Rep. 519, 197 N. Y. Supp. 509; *Matter of George*, 120 Misc. Rep. 171, 197 N. Y. Supp. 716.

¶ 81 *Page 416.*

Continuation of general subject of administration on estates of Indians.

Deceased Indian's mother, appointed administratrix under tribal customs entitling her to administration if she

asserted her rights by having dead feast, was not "administratrix," within Decedent Estate Law, § 130, entitled to sue for wrongful death; statute requiring appointment by court or tribunal possessing probate powers. *Crouse v. N. Y. State Sys.*, 209 N. Y. Supp. 264; *Peters v. Tallchief*, 121 App. Div. 309, 106 N. Y. S. 64; *Matter of Printup*, 121 App. Div. 322, 106 N. Y. S. 74, and *Hatch v. Luckman*, 155 App. Div. 765, 118 N. Y. S. 689, 140 N. Y. S. 1123. The latter case discredits, if not expressly overrules, *Dole v. Irish*, 2 Barb. 639, and holds that the "dead feast" according to Indian custom, has never been recognized in law as having any legal existence in this state, and that its attempt to administer and divide the lands and property of the deceased, as to which its power in any event must be limited, was wholly without warrant of law, and void. This case has been distinguished, and not followed, in the case of *George v. Pierce*, 85 Misc. Rep. 103, 148 N. Y. S. 230; but, even if this latter case should be held to be controlling in the matter of the distribution of the property of a deceased Onondaga Indian, it is quite evident that an administrator appointed by any such illy defined tribal custom is not the personal representative contemplated by the Decedent Estate Law.

¶ 82 Page 417.

Amendment to sec. 118, Sur. Ct. Act, relating to priority of right to letters of administration by making no discrimination as to sex.

§ 118. Who entitled to letters of administration.

Administration in case of intestacy must be granted to the persons entitled to take or share in the personal property, who are competent and will accept the same, in the following order:

1. To the surviving husband or wife.

2. To the children.
3. To the grandchildren.
4. To the father *or mother*.
5. To the brothers *or sisters*.

6. To any other next of kin entitled to share in the distribution of the estate, preference being given to the person entitled to take the largest share in the estate, except as hereinafter provided.

If a person entitled to take all the personal estate is an infant, or an incompetent, or has died, his guardian, committee or legal representative, as the case may be, shall have a prior right to letters in his place and stead.

If all the persons entitled to take the personal estate are infants, or adjudged incompetents, or, if no adult or competent person entitled to take or share in the estate will accept the same, letters may be granted to the general guardian of an infant or to the committee of an incompetent, in the place of such infant or incompetent.

If no person entitled to take or share in the estate will accept the same or an appointment is not made by consent as hereinafter provided, then administration shall be granted as follows:

- a. To the public administrator.
- b. To the county treasurer of the county, or to the petitioner, in the discretion of the surrogate.
- c. To any other person or persons.

If several persons have an equal right to administration, *there shall be no preference on account of sex, but that person must be appointed, who will, in the judgment of the surrogate, best manage the estate of the intestate.* Relatives of the whole blood *must be preferred* to those of the half blood. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons. Administration may be granted to one or more competent persons, jointly with a person entitled upon the application of a person entitled to take or share in the personal property, or to a competent person or persons not entitled, upon the consent of all the persons entitled to take or share in the estate whether within or without this state and competent, which consent must be in writing, and filed in the office of the surrogate. For the purposes of this section a trust company or other corporation authorized to act as administrator shall be included in the word "person." (Amended by Laws 1925, chap. 574. In effect Sept. 1, 1925.)

Page 418.

The amendment of 1925 eliminates two separate classes, mother and sister, and puts the mother in the same class with the father and the sister in the same class with

the brother, thus doing away with any distinction of sex as is distinctly set forth in a general statement which has been incorporated into the section.

The amendment of 1923 consists in eliminating the words in the last part of the section "who are within the state," and substituting "whether within or without the state." The amendment is unfortunate for it will raise the question if a nonresident must not consent, while as the original read the consent of a nonresident was not necessary. It should be the practice to give residents the preference over nonresidents so that the estate may be kept within the jurisdiction.

The order of eligibility set forth in section 118 is mandatory upon the Surrogate. *Matter of Albrecht*, 119 Misc. Rep. 554, 196 N. Y. Supp. 765.

Page 419.

Continuation of subject relating to appointment of guardian as administrator.

Where the guardian of the estate of an infant and the guardian of the person both make application to be appointed administrator of the infant's deceased mother's estate, the infant being the sole next of kin, the guardian of the infant's estate has the preference. *Matter of McGuire*, 115 Misc. Rep. 84, 189 N. Y. Supp. 62.

Page 423.

Continuation of subject "effect of divorce" on right to administration.

A former husband, although he may be entitled to a

share of his former wife's personal estate (§ 455) is not entitled to administration except as a stranger. *Matter of Albrecht*, 119 Misc. Rep. 554, 196 N. Y. Supp. 765.

Page 428.

Continuation of general subject of right and priority to letters of administration.

Public Administrator. See § 89.

A husband who has divorced his wife, although he may be entitled to share in her estate (§ 455), is not entitled to letters of administration over the public administrator. *Matter of Albrecht*, 119 Misc. Rep. 554, 196 N. Y. Supp. 765.

Aliens.

A nonresident alien is not entitled to letters, even "contingently." *Matter of Ferrigan*, 92 App. Div. 376, 87 N. Y. Supp. 16.

An alien resident may be appointed administrator. *Tanas v. Municipal G. Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053.

Alien nonresident cannot authorize holder of his power of attorney to receive letters.

A resident acting under a power of attorney from a sole alien nonresident next of kin, can not be designated to receive letters. Such alien could not receive letters himself, and therefore could not authorize another to do what he himself could not do. *In re Ferguson*, 92 App. Div. 376, 87 N. Y. Supp. 16; *Sutton v. Public Adm.*, 4 Dem. 33.

¶ 83 Page 426.

Continuation of general subject of citation on application for administration.

Citation where all interested parties join in petition.

Where all the parties interested join in the petition, a citation is not necessary, since by making the petition they are in court. *Matter of Rowe*, 197 App. Div. 449, 189 N. Y. Supp. 395. Aff. 232 N. Y. 554.

Page 429.

Continuation of subject of citing nonresidents.

Although the surrogate, in his discretion, may issue letters without a citation to nonresidents, yet if a nonresident appears and demands letters or moves to have letters issued without citation to him revoked in a case when he was prior entitled, it is well settled that a surrogate has no discretion to exclude a person entitled to priority of appointment as administrator under section 118 of the Sur. Ct. Act, unless by reason of one of the grounds of incompetency specified in section 94 of the Sur. Ct. Act.

Coope v. Lowerre, 1 Barb. Ch. 45 (1845).

O'Brien v. Neubert, 3 Dem. Sur. 156 (1884).

Matter of Wilson, 92 Hun, 318; 322, 36 N. Y. Supp. 882 (1895).

Matter of Campbell's Estate, 123 App. Div. 212, 216, 108 N. Y. Supp. 281 (1908), affirmed 192 N. Y. 312, 316.

Matter of McOwen's Estate, 114 Misc. Rep. 151, 155, 185 N. Y. Supp. 907 (1921).

Matter of Eggsware, 123 Misc. Rep. 548, 206 N. Y. Supp. 22.

¶ 89 Page 451.

Continuation of subject "Public administrator in New York county."

The public administrator is entitled to letters of administration on the estate of a woman over the former husband who divorced her, even though he may share in her estate. Section 13, Chap. 230, L. 1898, does not authorize letters to the former husband in such cases. *Matter of Albrecht*, 119 Misc. Rep. 554, 196 N. Y. Supp. 765.

¶ 90 Page 453.

Addition to subject of appointment of temporary administrator.

While section 126 of the Sur. Ct. Act provides that a surrogate may, in his discretion, issue letters of temporary administration, when for any cause delay necessarily occurs in granting letters testamentary or letters of administration, or in probating a will, it is usual to inquire into the necessity of such an appointment, where the application is opposed, and where the estate is small and consists of personality only, it might appear unnecessary to issue temporary letters of administration, even though there will be delay in the probate of the will.

Such section provides for no right of priority to any class of persons to such an appointment, such as is provided by section 118 of the same act (as amended by Laws 1921, ch. 201 and Laws 1923, ch. 214) in regard to those entitled to letters of administration, and by section 133 as to those entitled to letters of administration with the will annexed. Chapter 71 of the Laws of 1864, section 10, amended chapter 460 of the Laws of 1837, section 23, so as to give the executor named in a will a prior right to be appointed temporary administrator, but by chapter 782 of the Laws of 1867, section 7, the provisions which gave such

preference in the act of 1864 were repealed. It would therefore seem clear that whether the surrogate should appoint as a temporary administrator of a decedent's estate one who is named as executor in the will being contested, or some other person, must be decided in each case that presents itself upon its own particular facts and circumstances. *Matter of Eggsware*, 123 Misc. Rep. 541, 206 N. Y. Supp. 18.

"Where an application for the appointment of one named as an executor has been opposed on account of his unfriendly relations with contestants, or of his alleged undue influence in shaping the testamentary dispositions of the decedent, or for some like cause, such application has often been denied." *Jones v. Hammersley*, 2 Dem. 286; *Haas v. Childs*, 4 Dem. 137; *Matter of Hilton*, 29 Misc. Rep. 532, 61 N. Y. Supp. 1073; *Matter of Ashmore*, 48 Misc. Rep. 312, 96 N. Y. Supp. 772.

"A collector and receiver represents the interests of the respective legatees, if the will shall be admitted to probate; but in case of rejection, he represents the heirs and next of kin, and should not be appointed, when it is apparent that, in respect to the probate of the will, he is in hostility to any party he must thus represent, except upon the consent of the respective parties, or for some very special reason rendering him indispensable in the proper administration of the estate." *Howard v. Dougherty*, 3 Redf. 535.

To the same effect, see, also,

Mootrie v. Hunt, 4 Bradf. Sur. 173 (1857).

Crandall v. Shaw, 2 Redf. Sur. 100 (1874).

Cornwell v. Cornwell, 1 Dem. Sur. 1 (1882).

Matter of Sterns, 2 Con. Sur. 272, 9 N. Y. Supp. 748 (1890).

Matter of Plath, 56 Hun, 223, 9 N. Y. Supp. 251 (1890).

Matter of Eddy's Estate, 10 Misc. Rep. 211, 31 N. Y. Supp. 423 (1894).

Matter of Durban's Estate, 175 App. Div. 688, 690, 160 N. Y. Supp. 945 (1916), *affd.* 220 N. Y. 589.

Matter of Burnham's Will, 114 Misc. Rep. 455, 186 N. Y. Supp. 520 (1921).

¶ 91 *Page 458.*

Addition to subject of appointment of administrator with the will annexed.

Determine whether conditions require an administrator with the will annexed or a successor trustee.

As the method of appointing an administrator with the will annexed and a substitute trustee are governed by different statutory provisions, it is first necessary to determine which of the two appointments should be made. Section 133 of the Sur. Ct. Act (Laws 1920, ch. 928) provides for the appointment of an administrator with the will annexed, while section 168 of said act (as amended by Laws 1922, ch. 456) provides for the appointment of a successor trustee. Under the former section, an order of priority is established in regard to those who are entitled to such letters. Under the latter section, no such order of priority is established, and while the surrogate may, and usually does, consider the wishes of the parties to the proceedings, the person to be appointed is in the discretion of the surrogate, and he is not bound to appoint a petitioner. *Powers v. Powers*, 189 App. Div. 112, 115, 178 N. Y. Supp. 297 (1919); *Matter of Gunther*, 197 App. Div. 28, 39, 188 N. Y. Supp. 615 (1921); *Matter of Eggsware*, 123 Misc. Rep. 548, 206 N. Y. Supp. 22.

Page 459.

Continuation of subject of excluding persons having a prior right.

A person having a prior right to administration can not be excluded. A person having an equal right must be heard, if he desires, and if excluded it must be on sufficient reason. *Matter of Manley's Estate*, 12 Misc. Rep. 472, 473, 34 N. Y. Supp. 258 (1895). See, also, *Hayward v. Place*, 4 Dem. Sur. 487 (1886), affd. 105 N. Y. 629; *Matter of Eggsware*, 123 Misc. Rep. 548, 206 N. Y. Supp. 22.

Page 462.

Males not preferred to females.

Section 133, Sur. Ct. Act, provides that except as to the right of priority in granting letters C. T. A. the provisions of section 118, Sur. Ct. Act shall apply. That section now (§ 82 Supplement) says no distinction of sex shall be made in making the appointment of an administrator, and therefore the case *Matter of Wood* (27 Abb. N. C. 329), and similar cases do not now apply.

Page 463.

Continuation of subject of letters "To assignee of whole estate."

Letters of Administration C. T. A. to assignee of legatee.

The assignee of an alien sole legatee is not entitled to letters C. T. A., and an assignee of such an interest can not be classed as a residuary legatee. *Matter of Jessup* (Jordan's will), 202 App. Div. 710, 195 N. Y. Supp. 193.

¶ 93 *Page 468.*

Addition to subject of order in transfer tax proceedings.

Order not controlling on judicial settlement on other question than tax.

Determination of transfer tax appraiser in fixing value of testator's interest in good will of partnership of which he was a member is not controlling in proceeding for judicial settlement of executor's account, though executors paid tax on basis of appraisal. *Matter of Brown*, 124 Misc. Rep. 473, 209 N. Y. Supp. 237, affd. 211 App. Div. 662, 208 N. Y. Supp. 359.

Page 468.

Amendment to sec. 228, Tax Law, relating to jurisdiction of the Surrogate in transfer tax proceedings.

§ 228. Jurisdiction of the surrogate.

The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction.

When it is made to appear to a surrogate of any county in this state that a safe deposit company, trust company, bank, person or corporation has in its possession or under its control papers of a decedent of whose estate such court has jurisdiction or that the decedent had leased from such a corporation a safe deposit box, and that such papers or such safe deposit box may contain a will of the decedent, or a deed to a burial plot in which the decedent is to be interred, he may make an order directing such safe deposit company, trust company, bank, person or corporation to permit a person named in the order to examine such papers or safe deposit box in the presence of a representative of the tax commission and an officer of such safe deposit company, trust company, bank or corporation, or agent of such person, and if a paper purporting to be a will of the decedent, or the deed to a burial plot is found among such papers, or in such box, to deliver such will to the clerk of the surrogate's court of such county, or such deed to such person as may be designated in such order. The clerk of said court shall furnish a receipt upon the delivery to him of the will. (Amended by Laws 1925, ch. 143. In effect July 1, 1925.)

Page 469.

Amendment to sec. 227, concerning liability of trust and safe deposit companies, banks, and other corporations having possession of taxable assets.

§ 227. Liability of certain corporations to tax.

If a foreign executor, administrator, or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the tax commission or the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution,

person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or nonresident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interest in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the tax commission at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed *under the provisions of this article or under the provisions of articles ten-a and ten-b of this chapter* on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the tax commission consents thereto in writing. And it shall be lawful for the said tax commission or its representative to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of not less than five thousand or more than twenty-five thousand dollars; and the payment of such tax and interest thereon, or of the penalty above prescribed, or both, may be enforced in an action brought by the tax commission in any court of competent jurisdiction. (Amended by Laws 1925, ch. 143. In effect July 1, 1925.)

Page 469.

Article 10 of the Tax Law, relating to Taxable Transfers was largely amended by ch. 143 of the Laws of 1925.

The title was amended by separating the provisions relating to residents and nonresidents. Article 10-a applies to nonresidents.

The principal change is regarding taxation of estates by entirety and joint tenants; making a new article (10-b) following somewhat the Federal Estates Tax Law but making it apply only to net estates of over one million dollars, and providing that no deduction from the transfer tax shall be made on account of such tax or taxes collected by other states.

§ 220. Taxable transfers—residents.

A tax shall be and is hereby imposed upon the transfer of any property real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed thereof while a resident of the state.

2. When the transfer is made by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor or intended to take effect in possession or enjoyment at or after such death, or where any change in the use or enjoyment of property included in such transfer, or the income thereof, may occur in the lifetime of the grantor, vendor or donor by reason of any power reserved to or conferred upon the grantor, vendor or donor, either solely or in conjunction with any person or persons to alter, or to amend, or to revoke any transfer, or any portion thereof, as to the portion remaining at the time of the death of the grantor, vendor or donor, thus subject to alteration, amendment or revocation. If any one of the transfers *mentioned in this subdivision* is made for a valuable consideration, the portion of the transfer for which the grantor or vendor receives equivalent monetary value is not taxable, but the remaining portion thereof is taxable.

3. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

4. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the

passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

5. Whenever property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant, or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property, shall be deemed a transfer taxable under the provisions of this article in the same manner as though (a) *in the case of tenancies by the entirety one-half of the property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, and (b) in all other cases in the same manner as though a fractional part of the property to be determined by dividing the value of the entire property by the number of joint tenants, joint depositors or persons belonged absolutely to the deceased joint tenant, joint depositor or person; and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will.*

6. The tax imposed hereby shall be upon the clear market value of such property at the rates hereinafter prescribed.

7. *In determining the amount of any transfer under the provisions of this article no deduction whatsoever shall be allowed for or on account of any death taxes paid to the United States or to any state or territory or foreign jurisdiction, or for or on account of any tax paid under the provisions of article ten-b of this chapter, upon any estate or property transferred.* (Amended by Laws 1925, ch. 143. In effect July 1, 1925.)

Page 471.

Amendment to sec. 221 exempting gifts to a Bishop for other than his personal use.

§ 221. Exceptions and limitations.

Any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop *where such bequest or devise is for his official as distinguished from his personal use*, or to any religious, educational, library, charitable, missionary, benevolent, hospital or infirmary corporation, wherever incorporated, including corporations organized exclusively for bible or tract purposes and corporations organized for the enforcement of laws relating to children or animals, or real

property to a municipal corporation in trust for a specific public purpose, shall be exempted from and not subject to the provisions of this article. There shall also be exempted from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association wherever incorporated or located, organized exclusively for the moral or mental improvement of men or women or for scientific, literary, patriotic, cemetery or historical purposes or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes. There shall also be exempted from and not subject to the provisions of this article all property or any beneficial interest therein so transferred to any father, mother, husband, wife, widow or child of the decedent, grantor, donor or vendor if the amount of the transfers to such father, mother, husband, wife, widow or child is the sum of five thousand dollars or less; but if the amount so transferred to any father, mother, husband, wife, widow or child is over five thousand dollars, the excess above these amounts, respectively, shall be taxable at the rates set forth in the next section. (Amended by Laws 1925, ch. 143. In effect July 1, 1925.)

Section 221-c added by Laws 1922—repealed.

Section 221-d added by Laws 1922—repealed.

Page 472.

Amendment to sec. 230, Tax Law, providing that where the highest rate has been assessed on contingent gifts, a bond may be given in place of cash payment, regulations for computing amount, and application for modification.

§ 230. Proceedings by appraiser.

In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the tax commission, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this chapter in counties in which the

office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the tax commission, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of moneys appropriated for such purpose. No deduction shall be allowed from the appraised value of the property transferred on account of any liability of decedent incurred or assumed by the acquisition, care, improvement, use, enjoyment or disposition of property without the state, the transfer of which is not subject to tax under the provisions of this article. Any transfer of his property made by a decedent by deed, sale or gift within two years prior to his death, without a valid and adequate consideration therefor, shall be presumed to have been made in contemplation of death within the meaning of this chapter.

The value of every future or limited estate, income, interest or annuity for any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the encumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the

actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this chapter.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interest is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest*, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, *computed upon the full, undiminished value of the property as aforesaid*; and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. *If application for modification of the temporary taxing order is not made within six months after the happening of any contingency or condition the tax as finally fixed and determined shall bear interest at the rate of six per centum per annum from the date when such contingency or condition happened to the date of the entry of the modifying order, which interest shall be in addition to the interest imposed by section two hundred and twenty-three of this article for nonpayment of the tax at the highest possible rate within*

eighteen months from the date of the transfer. Whenever a tax on a transfer dependent on a contingency or condition has been determined at the highest rate in the manner prescribed by the foregoing provisions *and the personal property included in the transfer is less than the amount of said tax*, the executors or trustees, in lieu of paying the amount so determined, may elect to file in the office of the *tax commission* a bond to the people of the state, approved as to form and amount by the *tax commission*, for the purpose of securing the payment of the tax on such transfer. The *tax commission* at any time may *increase or decrease* the amount of such bond as *conditions* may require.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the tax commission. (Amended by Laws 1925, ch. 144. In effect March 16, 1925.)

Page 476.

Tenancy by entirety and joint deposits.—Dates when law takes effect.

Tenancy by entirety.

Value of estate not taxable if created before April 26, 1916.

Value of estate taxable if created after April 26, 1916, and death of husband or wife occurs prior to April 8, 1924.

One-half value of estate taxable if created April 26, 1916, and after, and death occurs after April 8, 1924.

Joint accounts and property.

If right accrued prior to May 20, 1915, the right and in-

terest of the deceased is only taxable, not the whole value. If right accrued after May 20, 1915, the entire value of the property is taxable.

Continuation of subject of transfer tax on estate held by entirety.

Where the tenancy by the entirety was created before the passage of the law of 1916 specifically taxing such estates, the value of the property is not taxable, no matter when the husband or wife dies. *Matter of Lyon*, 233 N. Y. 208.

Dower in estates by entirety after the amendment of 1916.

Subdivision 7 of sec. 220 Tax Law as amended in 1916 provides as to estates by the entirety created after 1916 that they should be subject to tax as though the whole property had been "bequeathed" to the surviving tenant by will. It was held *In re Dunn*, 205 App. Div. 407, 199 N. Y. Supp. 673, Justice Page dissenting, that by force of this language a widow was entitled to have her dower deducted in computing the tax.

The foregoing case (*Matter of Dunn*) was reversed, 236 N. Y. 461, and it was held that the widow was not entitled to a deduction of the value of her dower.

Continuation of subject of transfer tax on property transferred in contemplation of death.

Burden of proof.

Special tax laws are always construed against the government and favorably to the taxpayer. *Matter of Vassar*, 127 N. Y. 1; *Matter of Thorne*, 44 App. Div. 8, 60 N. Y. Supp. 419.

The burden is on the state to show that the gift was made in contemplation of death.

Matter of Enston, 113 N. Y. 174.

Matter of Beyer, 190 App. Div. 802, 180 N. Y. Supp. 396.

Matter of Wadsworth, 198 App. Div. 483, 190 N. Y. Supp. 819.

Continuation of subject of exemption where transfer was made in contemplation of death.

“Therefore the entire value of the bonds and mortgages transferred to the decedent's wife as a gift intended to take effect at or after his death constituted a transfer taxable under the provisions of the Tax Law as it existed prior to the amendment effected by chapter 706 of the Laws of 1910. This amount is taxable at 1 per cent, and should not be added to the value of the transfer effected by the will of the decedent, or to the gift made by him to his wife in contemplation of death.” *Matter of Thompson*, 89 Misc. Rep. 69, 151 N. Y. Supp. 246.

Page 479.

“Exemptions and rates under some previous statutes” supplemented.

Act of 1897, Chap. 284, amending § 220,

Taxes transfer of real or personal property of the value of \$500 or over 5 percent except as exempted in § 221.

Act of 1898, Chap. 88, amending § 221,

Fixes tax of 1 percent on \$10,000 personal estate or over when passing to father, mother, husband, wife, child, brother, sister, wife or widow of son, or husband of daughter, and adopted child, etc.

Act of 1901, Chap. 458, amending § 221,

Applies to personal estate only.

Act of 1903, Chap. 41, amending § 221,

Taxes real or personal property of the value of \$10,000 or more passing to same persons described in L. 1898.

Continuation of subject of transfer tax on annuities.

The transfer tax accrued against the interest of an an-

nuitant is payable first from the fund, and then the income is subject to amortization. *Matter of Fleisher*, 209 N. Y. Supp. 684; *Matter of Tracy*, 179 N. Y. 501.

Where the legacy is a gift of income from a trust estate, and not an annuity (see ¶ 289), the transfer tax is charged against the corpus of the estate. *Matter of Kohler*, 193 App. Div. 8, 183 N. Y. S. 550; *Matter of Murphy*, 124 Misc. Rep. 672, 209 N. Y. S. 686.

Page 480.

Amendment to sec. 241, relating to tax on contingent remainders and deposit of securities.

§ 241. Disposition of revenues; tax on contingent remainders; refunds in certain cases.

The tax commission shall deposit all taxes collected by it under this article, except as hereinafter otherwise provided, in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The tax commission shall on the first day of each month make a verified return to the state treasurer of all taxes received by it under this article, stating for what estate, and by whom and when paid; and shall credit itself with all expenditures made since its last previous return on account of such taxes, for refunds lawfully chargeable thereto. The comptroller shall on or before the tenth day of each month pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month.

Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the tax commission, in the counties wherein this tax is payable direct to it, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate the tax assessed upon such contingent remainders, and the tax commission or the county treasurer shall deposit the

amount of tax so retained in some solvent trust company or trust companies or savings banks in this state designated by the state comptroller, to the credit of the state comptroller on account of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller on the certificate of the tax commission, shall turn over the amount so retained to the state treasurer as provided herein and by section two hundred and forty of this chapter, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller on the certificate of the tax commission shall refund any excess of tax so held to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees of any estate may elect to assign to and deposit with the tax commission or the county treasurer, bonds or other securities of the estate approved by the tax commission, both as to the form of the collateral and the amount thereof, for the purpose of securing the payment of the tax on said remainder, which said bonds or other securities shall be held by the tax commission, or the county treasurer to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the tax commission or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates.

If any executor or trustee shall have deposited with the tax commission or the county treasurer, cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders, the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the tax commission, or the county treasurer, cash or securities, or both cash and securities, to an amount less than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the entry of the order determining the correct amount of tax due, pay to the tax commission, or the county treasurer, whichever is entitled under the provisions of this article to receive the tax, the balance due on account of said tax. *In case securities shall have been deposited and the tax upon such contingent remainders as finally assessed and determined shall be paid, the executor or trustee shall be entitled to the return of such securities; but if the tax is not paid within sixty days after the entry of the order finally assessing and determining the tax, the tax commission may sell the securities so deposited in the open market or at public auction, at its option, and apply the proceeds thereof to the payment of the tax.* If on account of the time or manner of payment of a tax under this article it be impossible to identify or separate the portion thereof paid on

account of a contingent remainder pursuant to this section and the whole of such payment shall have been deposited in the state treasury, the portion of the tax on account of such contingent remainder to be held or deposited on account of the estate pursuant to this section shall be deemed a refund under this article, and shall be drawn, on the certificate of the tax commission and approval of the comptroller, from moneys deposited with the state comptroller and available for refunds under this article, and when so drawn shall be deposited to the credit of the state comptroller on account of the estate as provided by this section. Bonds or other securities to be deposited with the tax commission pursuant to this section shall be turned over by it to the state comptroller for safe keeping. (Amended by Laws 1925, ch. 144. In effect March 16, 1925.)

Page 481.

Amendment to sec. 235, relating to proceedings by district attorneys for collection of tax.

§ 235. Proceedings by district attorneys.

If, after the expiration of eighteen months from the accrual of any tax under this article, such tax shall remain due and unpaid, after the refusal or neglect of the persons liable therefor to pay the same, the tax commission shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation, and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the code of civil procedure or surrogate court act for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney or the tax commission, furnish, without fee, one or more transcripts of such decree which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the tax commission or county treasurer may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his

discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest, the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, all expenses incurred for the service of citations and other lawful disbursements shall be paid out of moneys appropriated for such purpose, upon order of the tax commission. In proceedings to which the tax commission is cited as a party under section two hundred and thirty of this chapter, it is authorized to designate and retain counsel to represent it and to pay the expenses thereby incurred out of money appropriated for such purpose. (Amended by Laws 1925, ch. 143. In effect July 1, 1925.)

Page 482.

Amendment to sec. 236, Tax Law, respecting receipts for transfer tax.

§ 236. Receipts for taxes.

The receipts issued for the payment to the tax commission of any tax under this article, as provided by section two hundred and twenty-two, shall be signed and sealed by the tax commission and if issued by any county treasurer, countersigned by the tax commission. Upon countersigning the receipt, the tax commission shall charge the county treasurer receiving the tax with the amount thereof and affix the seal of its office to the same and return to the proper person.

No executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article unless he shall produce a final receipt so *signed and sealed, or countersigned and sealed*, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the officer issuing such receipt, be entitled to a duplicate thereof, to be signed, sealed and countersigned in the same manner as the original.

Any person shall, upon the payment of fifty cents, be entitled to a certificate of the tax commission that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the county clerk or register of the county where such real property is situated, in a book to be kept by him for that purpose, which shall be labeled "transfer tax." (Amended by Laws 1924, ch. 357. In effect July 1, 1924.)

Page 483.

Transfer tax on estates of nonresidents. Prior to July 1, 1925.

"Rule for Fixing the Tax upon Transfers from Nonresident Decedents. To fix the tax in the case of a transfer from a nonresident decedent, determine,

"First: The aggregate transfer; that is, the fair market value of the property, real or personal, whether within or without the state, passing to the transferee from the estate of the decedent after making the deductions computed as if the decedent were a resident of this state and all his property were located within this state.

"Second: The New York transfer; that is, the fair market value of that part of the property, included in said aggregate transfer, passing to the transferee from property of which the transfer is taxable under this chapter, after computing the deductions as aforesaid.

"Third: The tax which would be imposed upon such aggregate transfer if the whole thereof were taxed under this chapter.

"The amount of the tax upon the transfer taxable hereunder shall be such a part of what the tax would be upon said aggregate transfer, as the said New York transfer bears to the said aggregate transfer, but without increasing the graded rate by the inclusion of property without the state and without taxing transfers of which the amount is not over five hundred dollars."

The purpose of this section is accurately and briefly stated in the letter of a former president of the State Tax Commission, published in Gleason & Otis' *Inheritance Taxation* (3d Ed.) p. viii of the introduction, in the following words:

"Chapter 432 adds section 221-c to the Tax Law, which describes the manner of computing the tax on property left by a nonresident and which is taxable in this state. The amendment provides that only a proportionate part of the debts due New York creditors *and of the exemptions allowed to legatees shall be deducted, instead of the entire amount of such items as the statute has been administered in the past.*"

It is clear that under the statute and the events preceding its enactment it must have been the intention of the Legislature to include within the word "deductions" the word "exemption," and to prorate the exemptions as well as deductions for administration expenses and debts. This amendment changed the rule theretofore laid down in *Mat-ter of Porter*, 148 App. Div. 896, 132 N. Y. S. 1143, affirming

67 Misc. Rep. 19, 124 N. Y. S. 676, and other cases, which permitted the deduction of all the New York debts from the New York assets in ascertaining the value of the New York transfer and provided for the deduction of the total statutory exemption. The amendment made by our Legislature in 1922 was copied from the provisions of the New Jersey transfer tax statute dealing with the valuation of nonresident's estates. Laws of New Jersey of 1909, ch. 228, § 12, as variously amended, construed in *Matter of Dellinger's Estate*, 94 N. J. Eq. 409, 120 A. 27. The constitutionality of the rule of taxation fixed by that statute for the proportional taxation of nonresidents' estates was sustained by the United States Supreme Court in *Maxwell v. Bugbee*, 250 U. S. 525.

Section 221-c added to Tax Law by L. 1922, ch. 432, in effect April 1, 1922—*now repealed*.

See *Matter of Cooke*, 124 Misc. Rep. 347, 208 N. Y. Supp. 523. (Foley, surrogate.)

Page 483.

Article 10-A, Taxable Transfers on estates of nonresidents added by Laws of 1925, ch. 143, § 9. In effect July 1, 1925.

ARTICLE 10-A

TAXABLE TRANSFERS—NONRESIDENTS

- | | |
|---------|---|
| Section | 248. Taxable transfers—nonresidents. |
| | 248-a. Deductions. |
| | 248-b. Rates of tax. |
| | 248-c. Accrual and payment of tax. |
| | 248-d. Discount and interest. |
| | 248-e. Lien of tax; warrant for collection. |
| | 248-f. Refund of tax erroneously paid. |
| | 248-g. Transfer in contemplation of death. |
| | 248-h. Receipts for taxes. |
| | 248-i. Disposition of revenues. |
| | 248-j. Returns of taxable property. |

- 248-k. Exemptions.
- 248-l. Limitation of time.
- 248-m. Powers of tax commission.
- 248-n. Taxes upon devises and bequests in lieu of commissions.
- 248-o. Assessment of tax.
- 248-p. Reciprocity.

§ 248. Taxable transfers—nonresidents.

A tax shall be and is hereby imposed upon the transfer by a nonresident or in case of a nonresident decedent of any property real or personal, or of any interest therein or income therefrom in trust or otherwise, in the following cases:

1. When the transfer is by will or intestate laws of any of the following items from any person dying seized or possessed thereof while a nonresident of this state;

(a) Real or tangible personal property within this state.

(b) Shares of stock or certificates of interest of corporations organized under the laws of this state, or of national banking associations located in this state, or of joint stock companies or associations organized under the laws of this state and including all dividends and rights to subscribe to the stock of such corporations, joint stock companies or associations or banks.

(c) The interest of such decedent in any partnership business conducted, wholly or partly, within the state of New York to the extent of the interest of the decedent in the partnership property within this state and the good will of such business within this state.

(d) Capital invested in business within this state, including good will.

2. When the transfer is of property included within any of the classes specified in subdivision one of this section and is made by deed, grant, bargain, **sale or gift made in contemplation of the death of the grantor**, vendor or donor, or intended to take effect in possession or enjoyment at or after such death, or where any change in the use or enjoyment of property included in such transfer, or the income thereof, may occur in the lifetime of the grantor, vendor or donor by reason of any power reserved to or conferred upon the grantor, vendor or donor, either solely or in conjunction with any person or persons to alter, or to amend, or to revoke any transfer, or any portion thereof, as to the portion remaining at the time of the death of the grantor, vendor or donor, thus subject to alteration, amendment or revocation. If any one of the transfers mentioned in this subdivision is made for a valuable consideration, the portion of the transfer for which the grantor or vendor receives equivalent monetary value is not taxable, but the remaining portion thereof is taxable.

3. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this article, such appointment when made shall be deemed a

transfer taxable under the provisions of this article in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

4. Whenever property included within any of the classes specified in subdivision one of this article is held in the joint names of two or more persons, or as tenants by the entirety, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property, shall be deemed a transfer taxable under the provisions of this article in the same manner as though (a) in the case of tenancies by the entirety one-half of the property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, and (b) in all other cases in the same manner as though a fractional part of the property to be determined by dividing the value of the entire property by the number of joint tenants, joint depositors or persons belonged absolutely to the deceased joint tenant, joint depositor or person; and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will. The provisions of this subdivision shall apply in the case of any tenancy by the entirety which was taxable under the provisions of article ten of this chapter prior to the time when this article takes effect.

5. Any transfer of property included within any of the classes specified in subdivision one of this section, or of any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the curtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving, shall be taxable under the provisions of this article.

6. Nothing in this section shall be taken to include deposits in banks or trust companies or with persons or corporations acting as bankers, or to permit of a transfer tax by reason of keeping securities other than those taxable under this article, within this state.

§ 248-a. Deductions.

The clear market value of real property for the purposes of this article, whether taxable or nontaxable, shall be ascertained by deducting from the value thereof the amount of any incumbrances thereon. There shall also be deducted from the clear market value of any property or interest therein taxable under the provisions of this article, in cases where the transfer is by will or intestate laws, such proportion of the debts and funeral expenses of the decedent and such proportion of the expenses of administering the decedent's estate as the clear market value of the real property of the decedent within this state, ascertained as aforesaid, plus the clear market value of the

personal property of the decedent within this state taxable under this article bears to the total clear market value of the real property of such decedent wheresoever situated, ascertained as aforesaid, plus the total clear market value of the personal property of the decedent wheresoever situated. No deductions from the clear market value of taxable property shall be allowed if the transfer is not by will or intestate laws.

§ 248-b. Rates of tax.

Upon all transfers by will or intestate laws taxable under the provisions of this article of property or any beneficial interest therein, a tax is hereby imposed at the rate of three per centum upon the clear market value of the property or interest transferred, less the deduction specified in section two hundred forty-eight-a and in the case of any other transfer taxable under the provisions of this article a tax is hereby imposed at the rate of two per centum upon the clear market value of the property or interest transferred; provided, however, that in case of a transfer by will or intestate laws the executor or administrator of the estate may waive the right to any deductions (other than incumbrances on real property) as provided for in section two hundred forty-eight-a and elect to pay a tax of two per centum on the entire value of the property subject to taxation under this article.

§ 248-c. Accrual and payment of tax.

All taxes imposed by this article shall be due and payable at the time of the transfer. Such tax shall be paid to the tax commission which shall furnish duplicate receipts for such payment.

§ 248-d. Discount and interest.

If such tax is paid within six months from the time of the transfer, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the time of the transfer, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time of the transfer; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the tax commission shall determine that such tax could not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged.

§ 248-e. Lien of tax; warrant for collection.

Every such tax shall be and remain a lien upon the property transferred until paid; and the transferor or executor, administrator or trustee of the estate shall be personally liable for such tax. Every executor, administrator

or trustee shall have full power to sell so much of the property subject to the tax as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. The tax commission shall have power to enforce the lien hereby created by action, may maintain an action against the transferor or executor, administrator or trustee personally to recover the tax, or if the tax is not paid within eighteen months after the transfer the tax commission may issue a warrant under its official seal directed to the sheriff of any county, commanding him to levy upon and sell any or all of the real and personal property transferred found within his county for the payment of the amount thereof with interest as provided herein, and the cost of executing the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof by a time to be therein specified not later than sixty days from the date of the warrant. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments of courts of record and shall be entitled to the same fees for his services in executing the warrant to be collected in the same manner. In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any of its employees designated for that purpose, and in the execution thereof such employee shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty. If a warrant be returned not satisfied in full, the tax commission shall have the same remedies to enforce the claim for taxes against the transferor or executor, administrator or trustee as if the people of the state had recovered judgment against the transferor or executor, administrator or trustee for the amount of the tax.

§ 248-f. Refund of tax erroneously paid.

Whenever the tax commission shall determine that any tax collected under the provisions of this article has been erroneously collected, the amount so determined shall be refunded, without interest, out of the funds in the custody of the comptroller to the credit of such taxes.

§ 248-g. Transfer in contemplation of death.

Any transfer of his property made by a decedent by deed, sale or gift within two years prior to his death, without a valid and adequate consideration therefor, shall be presumed to have been made in contemplation of death within the meaning of this chapter.

§ 248-h. Receipts for taxes.

The receipts issued for the payment of any tax under this article shall be signed and sealed by the tax commission. No executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article, unless he shall produce a final receipt so signed and sealed, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the tax commission, be entitled to a duplicate receipt, to be signed and sealed in the same manner as the original. Any person shall, upon the payment of fifty cents, be entitled to a certificate of the tax commission that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the recording officer of the county where such real property is situated, in the book labeled "transfer tax."

§ 248-i. Disposition of revenues.

The tax commission shall deposit all taxes collected by it under this article in a responsible bank, banking house or trust company in the city of Albany designated by the comptroller to the credit of the comptroller on account of the transfer tax. Every such bank, banking house or trust company shall execute and file in the office of the comptroller an undertaking to the state, in the sum, and with such sureties as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as may be agreed upon. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The tax commission shall on the first day of each month make a verified return to the treasurer of all taxes received by it under this article, stating for what estate, and by whom and when paid; and shall credit itself with all expenditures made since its last previous return on account of such taxes, for refunds lawfully chargeable thereto. The comptroller shall on or before the tenth day of each month pay to the treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month.

All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 248-j. Returns of taxable property.

The transferor or executor or administrator of every estate shall at such times and in such manner as may be required by the tax commission file with
T

100 SUPPLEMENT TO HEATON'S SURROGATES' COURTS.

it a return under oath, setting forth such information as the tax commission may require. The tax commission may require such return to be made in duplicate and may also require such supplemental returns or additional data as may be necessary to establish the correct tax.

§ 248-k. Exemptions.

There shall be no exemptions whatsoever from the tax imposed by this article.

§ 248-l. Limitation of time.

The provisions of the civil practice act relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or interest prescribed by this article; provided, however, that as to real property in the hands of bona fide purchasers the transfer tax shall be presumed to be paid and cease to be a lien as against such purchasers after the expiration of six years from the date of accrual.

§ 248-m. Powers of the tax commission.

The powers conferred upon the tax commission by sections one hundred and seventy-one and one hundred and seventy-one-b of this chapter shall, so far as applicable, be exercisable with respect to the provisions of this article.

§ 248-n. Taxes upon devises and bequests in lieu of commissions.

If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this article.

§ 248-o. Assessment of tax.

The value of any property taxable under the provisions of this article and the amount of tax imposed thereon shall be determined by the tax commission which shall give notice of its determination and an opportunity to be heard with respect thereto to the transferor, executor, administrator, trustee or other person liable for the payment thereof. The tax shall be imposed upon the transfer of the property situated within this state and not upon the persons to whom the property is transferred.

§ 248-p. Reciprocity.

The tax imposed by this article in respect of personal property shall not be payable (1) if the transferor is a resident of a state or territory of the United States which at the time of the transfer did not impose a transfer tax or death tax of any character in respect of personal property within said state or territory of residents of this state, or (2) if the laws of the state or territory of residence of the transferor at the time of the transfer contained a reciprocal provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property providing the state or territory of residence of such nonresidents allowed a similar exemption to residents of the state or territory of residence of such transferor.

Page 483.

Estates Tax Law added by ch. 320, Laws 1925, in effect April 2, 1925, and affecting net estates exceeding one million dollars of decedents residents of New York State, the tax being payable to the New York State Tax Commission.

ARTICLE 10-B

ESTATE TAX

- Section 249. Definitions.
- 249-a. Rates of tax.
 - 249-b. Valuation of estates, inclusions.
 - 249-c. Valuation of estates, deductions.
 - 249-d. Notice and return by executor.
 - 249-e. When tax due; discount and interest.
 - 249-f. Determination of tax; refunds.
 - 249-g. Lien of tax; warrant for collection.
 - 249-h. Disposition of revenues.
 - 249-i. Exemptions in other articles not applicable.
 - 249-j. Limitation of time.
 - 249-k. Powers of tax commission.
 - 249-l. Duration of article.

§ 249. Definitions.

When used in this article—

1. The term "executor" means the executor or administrator of the dece-

102 SUPPLEMENT TO HEATON'S SURROGATES' COURTS.

dent, or, if there is no executor or administrator, any person in actual or constructive possession of any property taxable under this article;

2. The term "net estate" means the net estate as determined under the provisions of section two hundred forty-nine-c of this article;

3. The term "month" means calendar month; and

4. For the purposes of this article every person shall be deemed to have died a resident and not a nonresident of the state of New York, if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death; and also if and when by formal written instrument executed within one year prior to his or her death or by last will he or she shall have declared himself or herself to be a resident or a citizen of this state, notwithstanding that from time to time during such twenty-four months such person may have sojourned outside of this state and whether or not such person may or may not have voted or have been entitled to vote or have been assessed for taxes in this state; and also if and when such person shall have been a citizen of New York sojourning outside of this state. The burden of proof in a proceeding under this article shall be upon those claiming exemption by reason of the alleged nonresidence of the decedent. The wife of any person who would be deemed a resident under this section shall also be deemed a resident and her estate subject to the payment of the tax imposed by this article unless said wife has a domicile separate from him.

§ 249-a. Rates of tax.

If the net estate (determined as provided in section two hundred forty-nine-c) exceeds one million dollars, a tax equal to the sum of the following percentages of the value of the net estate so determined is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this article who at the time of his death was a resident of the state of New York:

1. One-quarter of one per centum of the amount of the net estate not in excess of fifty thousand dollars;

2. One-half of one per centum of the amount by which the net estate exceeds fifty thousand dollars and does not exceed one hundred thousand dollars;

3. Three-quarters of one per centum of the amount by which the net estate exceeds one hundred thousand dollars and does not exceed one hundred fifty thousand dollars;

4. One per centum of the amount by which the net estate exceeds one hundred fifty thousand dollars and does not exceed two hundred fifty thousand dollars;

5. One and one-half per centum of the amount by which the net estate exceeds two hundred fifty thousand dollars and does not exceed four hundred fifty thousand dollars;

6. Two and one-quarter per centum of the amount by which the net estate exceeds four hundred fifty thousand dollars and does not exceed seven hundred fifty thousand dollars.

7. Three per centum of the amount by which the net estate exceeds seven hundred fifty thousand dollars and does not exceed one million dollars;

8. Three and three-quarters per centum of the amount by which the net estate exceeds one million dollars and does not exceed one million five hundred thousand dollars;

9. Four and one-half per centum of the amount by which the net estate exceeds one million five hundred thousand dollars and does not exceed two million dollars;

10. Five and one-quarter per centum of the amount by which the net estate exceeds two million dollars and does not exceed three million dollars;

11. Six per centum of the amount by which the net estate exceeds three million dollars and does not exceed four million dollars;

12. Six and three-quarters per centum of the amount by which the net estate exceeds four million dollars and does not exceed five million dollars;

13. Seven and one-half per centum of the amount by which the net estate exceeds five million dollars and does not exceed eight million dollars;

14. Eight and three-quarters per centum of the amount by which the net estate exceeds eight million dollars and does not exceed ten million dollars;

15. Ten per centum of the amount by which the net estate exceeds ten million dollars.

The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any state or territory or the District of Columbia, including any tax imposed under article ten of this chapter, in respect of any property included in the gross estate. In no event shall the tax payable under this article exceed the amount, if any, by which twenty-five per centum of the United States estate tax exceeds the credits provided for in the preceding paragraph of this section.

§ 249-b. Valuation of estates, inclusions.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a

trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this article;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided, further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life.

(h) Subdivisions (b), (c), (d), (e), (f) and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this article.

§ 249-c. Valuation of estates, deductions.

For the purpose of the tax the value of the net estate shall be determined by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property (except, where such property is not situated in this state), to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for a fair consideration in money or money's worth, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the law of this state, but not including income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value of any property (a) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (b) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from such donor by gift or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under title three of the United States revenue act of nineteen hundred twenty-four or any prior act of congress of the United States was paid by or on behalf of the donor or the estate of such prior decedent as the case may be, and only in the amount of the value placed by the United States commissioner of internal revenue on such property in determining the value of the gift or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate and not deducted under paragraph (1) or paragraph (3) of this subdivision;

(3) The amount of all bequests, legacies, devises, or transfers, except bona fide sales for a fair consideration in money or money's worth, in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable,

scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. If the tax imposed by section two hundred forty-nine-a, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of this state, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes; and

(4) An exemption of fifty thousand dollars.

In determining the amount of the net estate real property of the decedent situated outside this state but within the United States shall be included and the tax shall be computed in the same manner as if said real property were subject to taxation hereunder, but there shall be credited on the total amount of tax so ascertained the amount of tax imposed with respect to said real property and the tax on said real property shall be deemed to have been imposed at the lowest rates prescribed by section two hundred forty-nine-a of this article.

§ 249-d. Notice and return by executor.

(a) The executor, within two months after the decedent's death, or within a like period after qualifying as such, shall give written notice thereof to the tax commission. The executor shall also, at such times and in such manner as may be required by the tax commission, file with it a return under oath setting forth such information as the tax commission may require. The tax commission may require such return to be made in duplicate and may also require such supplemental returns or additional data as may be necessary to establish the correct tax.

(b) Return shall be made in all cases where the gross estate at the death of the decedent exceeds one million dollars. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the tax commission such person shall in like manner make a return as to such part of the gross estate.

(c) Failure to make any return as herein provided shall subject the executor to a penalty of one thousand dollars to be recovered in an action brought by the attorney-general, and if such failure be with intent to evade the tax the executor shall be guilty of a misdemeanor; provided, however, that upon the return being filed the tax commission in its discretion may waive the penalty in any case where there was no intent to evade the tax.

§ 249-e. When tax due; discount and interest.

The tax imposed by this article shall be due and payable at the time of the

transfer and shall be paid to the tax commission which shall furnish duplicate receipts therefor. No executor shall be entitled to a final accounting of an estate in settlement of which a tax is due unless he shall produce such final receipt or a certified copy thereof. Any person shall be entitled to a duplicate receipt upon the payment of fifty cents to the tax commission. Any person shall upon payment of fifty cents to the tax commission be entitled to a certificate that the tax upon the transfer of any real estate of which any decedent died seized has been paid. Such certificate may be recorded in the office of the recording officer of the county where such real property is situated, in the book in which certificates issued pursuant to article ten of this chapter are recorded.

If the tax imposed by this article is paid within six months from the time of the transfer a discount of five per centum shall be allowed and deducted therefrom; if such tax is not paid within eighteen months from the time of the transfer interest shall be charged and collected thereon at the rate of ten per centum per annum from the time of the transfer, unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the tax commission shall determine that such tax could not be determined and paid as herein provided, in which case the tax commission may reduce the rate of interest to six per centum per annum for the period during which such cause of delay was operative.

§ 249-f. Determination of tax; refunds.

As soon as practicable after the return is filed the tax commission shall examine it and shall determine the correct amount of the tax and if it then appears that an excess amount has been paid the same shall be refunded, without interest, out of the funds in the custody of the comptroller to the credit of such taxes. In case of failure to file a return as required by this article the tax commission may determine the tax on the basis of the best information available, subject to correction from time to time if it appears that a further tax is due. Notice of the determination of any tax and an opportunity to be heard with respect thereto, shall be given to the executor.

§ 249-g. Lien of tax; warrant for collection.

The tax imposed by this article shall be and remain a lien upon the property transferred until paid and the executor of every estate shall be personally liable for the tax. Every executor shall have full power to sell so much of the property of the estate as will enable him to pay the tax in the same manner provided by law for the payment of a decedent's debts. The tax commission shall have power to enforce the lien hereby created by action, may maintain an action against the executor personally to recover the tax, or if the tax is not paid within eighteen months after the transfer the tax commission may issue a warrant under its official seal directed to the sheriff of

any county, commanding him to levy upon and sell any or all of the real and personal property included in the net estate found within his county for the payment of the amount thereof, with interest as provided herein, and the cost of executing the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof by a time to be therein specified, not later than sixty days from the date of the warrant. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects with like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments of courts of record and shall be entitled to the same fees for his services in executing the warrant to be collected in the same manner. In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any of its employees designated for that purpose, and in the execution thereof such employee shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty. If a warrant be returned not satisfied in full, the tax commission shall have the same remedies to enforce the claim for taxes against the executor as if the people of the state had recovered judgment against the executor for the amount of the tax.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this article that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

§ 249-h. Disposition of revenues.

The tax commission shall deposit all taxes collected by it under this article in a responsible bank, banking house or trust company in the city of Albany designated by the comptroller, to the credit of the comptroller on account of the estate tax. Every such bank, banking house or trust company shall execute and file with the comptroller an undertaking to the state, in the sum, and with such sureties, as are required and approved by him, for the safe-keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as may be agreed upon. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The tax commission shall on the first day of each month make a verified return to the treasurer of all taxes received

by it under this article, stating for what estate, and by whom and when paid; and shall credit itself with all expenditures made since its last previous return for refunds lawfully chargeable on account of such taxes. The comptroller shall on or before the tenth day of each month pay to the treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month.

All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 249-i. Exemptions in other articles not applicable.

No exemption enumerated in any other article of this chapter shall be construed as being applicable in any manner to the provisions of this article.

§ 249-j. Limitation of time.

The provisions of the civil practice act relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or interest prescribed by this article; provided, however, that as to real property in the hands of bona fide purchasers the tax shall be presumed to be paid and cease to be a lien as against such purchasers after the expiration of six years from the date of accrual.

§ 249-k. Powers of tax commission.

The powers conferred upon the tax commission by sections one hundred seventy-one and one hundred seventy-one-b of this chapter shall, so far as applicable, be exercisable with respect to the provisions of this article.

§ 249-l. Duration of article.

This article shall continue in effect only so long as the United States estate tax act shall contain a provision allowing credit of twenty-five per centum of the tax imposed thereby on account of estate, inheritance, legacy or succession taxes paid to any state or territory or to the District of Columbia. (Added by Laws 1925, ch. 320. In effect April 2, 1925.)

¶ 94 Page 494.

Continuation of subject of concurrent jurisdiction of Supreme and Surrogates' Courts.

An ex parte order made in Supreme Court concerning some litigation in which guardians were interested was set

aside by the Supreme Court on the ground that the Surrogate's Court of another county was the first to acquire jurisdiction, and that where tribunals have equal jurisdiction the matter should be retained and disposed of in the forum where judicial action was first sought.

Matter of Farmers' L. & T. Co., 123 Misc. Rep. 600, 205 N. Y. Supp. 895.

In re De Saulles, 101 Misc. Rep. 447, 167 N. Y. Supp. 445.

Garlock v. Vandevort et al., 128 N. Y. 374, opinion page 379.

Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 177 U. S. 51, opinion page 61.

Schuehle v. Reiman, 86 N. Y. 273.

The principle is sustained in *Matter of McTevey's Estate*, 93 Misc. Rep. 384, 158 N. Y. Supp. 136, where an execution had been issued out of Surrogate's Court and a motion made in Supreme Court to set same aside was denied, on the ground that the Surrogate's Court was the court having jurisdiction in the matter. This should be the rule to follow, particularly as to guardians of infants. The Surrogate's Court is the logical tribunal to appeal to for the care, custody, and control of infants, and only in an extreme case should another court interfere with its acquired jurisdiction.

¶ 95 Page 497.

Continuation of subject of residence or domicile of infant. See ¶ 18.

The material rules with respect to the residence of an infant are well founded: (1) The residence of the infant is that of the parents; (2) the infant cannot change its own residence during the lifetime of the parents; (3) where one

parents dies, the residence of the surviving parent becomes the residence of the infant, except under certain circumstances where the change may be fraudulent or made to alter the rules of succession or intestacy or to the detriment of the infant's rights; (4) in case of divorce the residence of the infant follows the residence of the parent to whom its custody has been awarded; (5) the fact that a divorce has been granted between the parents does not change the presumption of law that the residence of the child follows the residence of the surviving parent; (6) the surviving parent is entitled to be appointed guardian if not disqualified by unfitness. 1 Schouler, Wills, Exrs. & Adm. (6th Ed.) 731, 732. In New York, as early as the decision in *Brown v. Lynch*, 2 Bradf. Sur. 214, the right of the surviving mother to fix the residence of the infant was upheld, and this conclusion has been reaffirmed in more recent authorities.

Kennedy, v. Ryall, 67 N. Y. 379.

Matter of Hubbard, 82 N. Y. 90.

Matter of Kiernan, 38 Misc. Rep. 394, 77 N. Y. Supp. 924.

Matter of Thorne, 123 Misc. Rep. 621, 206 N. Y. Supp. 69.

The domicile of the father is the domicile of his infant children and will control where an infant is brought into this state by stratagem for the purpose of attempting to give the court jurisdiction. *Matter of Hubbard*, 82 N. Y. 90.

The residence of an infant remains in the county where his parent died, unless legally changed. *Matter of Hughes*, 1 Tucker, 38.

Actual residence in the county has been held sufficient to give jurisdiction where both parents were dead, although the legal domicile of the infant at the surviving parent's

last residence was in another county. *Matter of Pierce*, 12 Hun, 532. See also *Matter of Hubbard*, 82 N. Y. 90.

The assertion of jurisdiction by the surrogate in himself over an infant will not confer jurisdiction, but the surrogate may decide the question of residence on conflicting evidence and the decision will not be reversed on that ground. *Matter of Sherman*, 70 Hun, 465, 53 N. Y. St. Repr. 710, 24 N. Y. Supp. 283.

Page 499.

Divorce, effect of decree.

Where there has been a divorce between the parents and the custody of the infant born of the marriage has been given to one of the parties, upon the death of that one, the domicile of the infant was changed to that of the surviving parent, and the Surrogate's Court of that county was authorized to appoint a guardian. *Matter of Thorne*, 209 N. Y. Supp. 280.

In *Matter of Waring's Will*, 46 Misc. Rep. 222, 224, 94 N. Y. Supp. 82, the surrogate held that the effect of the decree of divorce, in depriving the guilty party of the custody of the child, was to punish him only during the period of their joint lives. The surrogate further pointed out that when the innocent party died, "this penalty ceased, and he [the surviving parent] became entitled to all his statutory rights, subject only to the control of the courts in case he should exercise them improperly or be unfit."

Section 117, Sur. Ct. Act (§ 96), relates to procedure and does not modify the rule as to residence nor does it apply where one of the divorced parents is dead. *Matter of Thorne*, 123 Misc. Rep. 621, 206 N. Y. Supp. 69.

Amendment regarding "sojourning."

The amendment to this section giving jurisdiction where

the infant has sojourned in the county for one year, must be considered in reading the cases decided before the amendment.

¶ 97 Page 507.

Continuation of general subject of conditional decree of guardianship.

Guardian—decree—conditional.

In granting an application for the appointment of a guardian proper conditions may be imposed in making the appointment.

There is precedent for attaching conditions to the appointment of the guardian.

Derickson v. Derickson, 4 Dem. Sur. 295.

Matter of Wagner, 75 Misc. 419, 135 N. Y. Supp. 678.

Matter of Mancini, 89 Misc. Rep. 83, 151 N. Y. Supp. 387.

Matter of Lamb's Estate, 139 N. Y. Supp. 685.

Matter of Cross, 92 Misc. Rep. 89, 155 N. Y. Supp. 1020, affd. 174 App. Div. 872, 159 N. Y. Supp. 1108, affd. 225 N. Y. 628.

Matter of Farrell, 123 Misc. Rep. 113, 205 N. Y. Supp. 364.

RECEIVING INSTRUCTION IN A PARTICULAR RELIGIOUS FAITH.

Matter of Cross Guardianship, 92 Misc. Rep. 113, 155 N. Y. Supp. 1020.

¶ 98 Page 508.

Amendment to sec. 180, Sur. Ct. Act, increasing value of estate to \$5,000 over which associate guardian may be appointed.

§ 180. Qualification of guardian of property.

Before letters of guardianship of an infant's property are issued by the

surrogate's court, the person appointed must take an official oath as prescribed by law and execute to the infant, and file in the surrogate's office his bond, with at least two sureties, in an amount fixed by the surrogate, not less than the value of the personal property, and of the rents and profits of the real property, and of the annual income receivable by him from any funds of which the general guardian will not have possession, conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust, and that he will, in all things, render a just and true account of all moneys and other properties received by him, and the application thereof, and of his guardianship, whenever required so to do, by a court of competent jurisdiction; but the surrogate may, in his discretion, limit the amount of the bond to not less than the value of the personal property, and of the rents and profits of the real property, or such annual income receivable by him, for the term of three years.

Where the property of the infant does not exceed the sum, or value, of *five* thousand dollars, as shown by the petition, the surrogate may, in his discretion, make an order dispensing with such bond wholly or partly, and directing that the guardian collect and receive the moneys and property of his ward jointly with a person designated in the order, and that all such moneys and other property, so far as the same are conveniently capable of deposit, shall be deposited in the name of such guardian, subject to the order of the surrogate, with such bank, savings bank, trust company, or safe deposit company as shall be designated in such order, and shall be withdrawn or removed only on the order of the surrogate.

The letters issued thereupon shall contain the substance of the order.

The cost of safe deposit box shall be a county charge. (Amended by Laws 1925, ch. 573. In effect Sept. 1, 1925.)

¶ 100 Page 519.

Amendment to Section 81, Domestic Relations Law.

The amendment consists in changing the code reference to § 187 of the Sur. Ct. Act.

Page 520.

Amendment to Section 188, Sur. Ct. Act, relating to qualifying by guardian by will or deed.

§ 188. Guardian by will or deed; qualification, letters.

Where a will, containing the appointment of a guardian, is admitted to pro-

bate, or a deed is recorded as provided in the foregoing section, the person appointed guardian must, within thirty days thereafter, qualify by taking and filing his oath of office, and a bond as fixed by the surrogate, unless contrary to the express provisions of the will, or deed, and by filing a petition or affidavit setting forth the facts which entitle him to so qualify and receive letters; except that a trust company so named, instead of filing such oath and bond, shall file a consent to accept such appointment duly executed and acknowledged; otherwise he is deemed to have renounced the appointment. But the surrogate, either before or after the expiration of thirty days, may extend the time so to qualify, upon good cause shown, for *such time as to him may appear to be just and reasonable*. A person appointed guardian by will or deed may, at any time before he qualifies, renounce the appointment by a written instrument, acknowledged, or proved, and duly certified, and filed in the surrogate's office. (Amended by Laws 1923, ch. 522. In effect immediately.)

Continuation of subject of appointment of guardian by will or deed.

The appointment of another person jointly with the surviving parent is not provided for in the statute and is void. *Matter of Underhill*, 116 Misc. Rep. 50, 189 N. Y. Supp. 448.

¶ 101 Page 523.

Amendment to sec. 190, Sur. Ct. Act, relating to guardian's annual accounts in the counties of Kings, New York, Bronx, Queens, Richmond and Westchester.

5. Notwithstanding the foregoing provisions of this section, when the property of an infant does not exceed the sum or value of two thousand dollars, and his moneys, and other property, if any, have been deposited subject to the order of the surrogate, pursuant to section one hundred and eighty of this act, the surrogate, if he shall keep in his office an accurate record of receipts and deposits of principal and income of the infant's estate and of withdrawals therefrom, may, in any year or years, in his discretion, relieve the guardian of such infant from the requirement of filing an annual inventory and account, in the surrogate's courts of the counties of Kings, New York, Bronx, Queens, Richmond, and Westchester, when the estate of an infant is administered jointly by the guardian with the guardian clerk of the said surrogate's courts. (Added by Laws 1924, ch. 84. In effect Sept. 1, 1924.)

This subdivision five was added by Laws of 1924.

¶ 102 Page 530.

Continuation of subject when letters are not prima facie proof of death.

Estate of absentee.

Letters issued upon the estate of an absentee are not prima facie evidence of death, nor an adjudication as to the time of death. *Bering v. U. S. Trust Co.*, 201 App. Div. 35, 193 N. Y. Supp. 753; *Matter of Rowe*, 197 App. Div. 449, 189 N. Y. Supp. 389, aff'd 232 N. Y. 554.

¶ 104 Page 537.

Continuation of subject of granting letters.

Improvidence.

The word "improvidence" refers to habits of mind and conduct which become a part of the man, and render him generally and under all ordinary circumstances unfit for the trust or employment in question.

Emerson v. Bowers, 14 N. Y. 449, 454.

Matter of Flood, 236 N. Y. 408.

¶ 105 Page 540.

Addition to subject relating to requiring the filing of a designation of the surrogate's clerk on whom to serve process.

By an amendment to § 167 Sur. Ct. Act, the discretionary power to require a person, before letters were issued to him, to file in the surrogate's office a designation of the surrogate's clerk on whom process could be served, is made mandatory in the cases of testamentary trustees as a prerequisite to their fully qualifying. See ¶ 79.

Amendment to Section 96, Sur. Ct. Act, concerning grant of letters.

§ 96. Objections to grant of letters.

Any person interested in the estate or fund may, before letters testamentary, of administration or of guardianship are granted, or a testamentary guardian or trustee is allowed to qualify and serve, file objections showing his interest in the estate or fund, and setting forth specifically one or more legal objections to granting the letters to one or more of the persons about to receive the same, or to allowing a testamentary guardian or trustee to qualify and serve. Where such objections are filed, the surrogate must stay the granting of letters to the person to whom objection is made, or refuse to allow the testamentary guardian or trustee to qualify until the matter is disposed of. (Amended by Laws 1922, ch. 653, § 1. In effect April 13, 1922.)

Page 542.

If the circumstances of the executor are such that they do not afford adequate security to the persons interested in the estate, he may still be entitled to letters by giving a proper bond. The surrogate may refuse to issue letters unless such a bond is given, but he can not absolutely deny letters. *Matter of Flood*, 236 N. Y. 408.

Page 544.

Addition to subject treating of trust companies and banks acting in a fiduciary capacity.

Amendment to Banking Law regarding appointment with consent of executor.

§ 188. Provisions relating to appointment of and exercise of powers as executor and in other fiduciary capacities.

2. Guardian, trustee or administrator. Any trust company may be appointed guardian, trustee or administrator, with or without the will annexed, on the application or consent of any person acting as such or as an executor or entitled to such appointment and in the place and stead of such person, or such trust company may be joined with any person so acting or entitled to such appointment; but such appointment shall be made upon such notice, as is required by law, to the persons interested in the estate or fund and on the consent of such of the principal legatees or other persons interested in

the estate or fund as the court, surrogate or judge making the appointment shall deem proper. No appointment so made shall be deemed to increase the number or persons entitled to full compensation beyond the number so entitled under the terms of the will or deed creating the trust or appointing a guardian or authorized by law. Whenever a person is joined with such trust company in any appointment as executor, guardian, trustee or administrator with or without the will annexed, his appointment may be under such limitation of powers and upon such terms and conditions as to deposit of assets by such person, with such trust company, or otherwise, and upon such reduced bond or security to be given by such person, as the court, surrogate or judge, making the appointment, shall prescribe.

When application is made to any court or officer having authority to grant letters of administration with the will annexed upon the estate of any deceased person, and there is no person entitled to such letters who is qualified, competent, willing and able to accept such administration, such court or officer may at the request of any party interested in the estate, grant such letters of administration with the will annexed, to any such corporation.

Any court or officer having authority to grant letters of guardianship of any infant may upon the same application as is required by law for the appointment of a guardian for such infant, appoint any such corporation as the guardian of the estate of such infant. (Amended by Laws 1923, ch. 700, § 1. In effect Sept. 1, 1923.)

Page 545.

Foreign trust company or banking corporation may receive appointment.

By chapter 23 laws of 1923 section 223 of the Banking Law was further amended permitting foreign trust companies and banking corporations to accept appointment as executor or testamentary trustee under conditions therein specified. Previously a limited authority had been granted by Chap. 687, L. 1911, and Chap. 317, L. 1913. By reason of these amendments *Matter of Avery*, 45 Misc. Rep. 529, 92 N. Y. Supp. 974, is no longer applicable.

¶ 107 *Page 551.*

Continuation of subject of "burden of proof."

The presumption of the validity of a marriage is suffic-

iently strong to cast the burden of showing its invalidity on the person seeking to prove the invalidity of a second marriage of a woman, who had not seen or heard from her first husband for over five years, by proving that the first husband was alive at the time of the second marriage. *Matter of Tompkins*, 207 App. Div. 166, 201 N. Y. Supp. 696.

Page 552.

Continuation of subject relating to removal of executor and trustee as incapable and dishonest.

Under the statutory provisions and the authorities, nothing less than mental or physical disability, such as to render the appointee of the testator incapable of understanding or performing the duties of the trust, or dishonesty in money matters, from which it might be inferred that the estate would be put in jeopardy, is sufficient to justify his removal. *Matter of Latham's Will*, 145 App. Div. 849, 130 N. Y. Supp. 535; *Matter of Jung*, 205 App. Div. 37, 199 N. Y. Supp. 122.

¶ 108 Page 555.

Continuation of subject of removal of testamentary trustee.

Suspension of trustee.

In commenting on the suspension of a trustee in *Gould v. Gould*, 203 App. Div. 807, 197 N. Y. Supp. 515, Justice Page said:

“In my opinion the court cannot suspend a testamentary trustee. The Surrogate's Court is given power to remove a testamentary trustee. Surrogate's Court Act, § 99. No power is granted to suspend such a trustee. Likewise the Supreme Court is given broader powers to remove a trustee and appoint his successor. Real Property Law (Consol. Laws, c. 50), § 112. No provision is made for his suspension. The reason for this is apparent. If a trustee is deprived of his power to execute the trust, its execution devolves upon the Supreme Court, which can only discharge the duty of administration through the appointment of a successor trustee or receiver. Furthermore, the court should not take such drastic action unless it clearly appears that he has violated or threatened to violate his trust, or unless

for any other cause he shall be deemed to be an unsuitable person to execute the trust. Real Property Law, § 112. If it does so clearly appear that he is unsuitable, he should be removed. If it does not clearly appear, he should be allowed to remain as a trustee. There can be no middle ground. The question must be determined on the facts proved on the application for the removal. If they are not sufficient, in my opinion it is improper to suspend *pendente lite*, upon the theory that more persuasive proof may be presented later, or that the trustee may be able, on the trial of the issues, to produce proof exonerating him from the charges. If he did not have such an opportunity afforded upon the motion, then it should have been denied."

Justices Smith and Finch dissented, holding that there should have been a suspension.

Correction—At bottom of page 555, change reference to § 162, Real Property Law, to § 112.

Page 558.

Continuation of subject of revocation of letters issued to a guardian.

Revocation where nonresident infant is of full age by the law of domicile.

When a nonresident infant becomes of full age in the state of domicile, he may have the letters of his guardian in this state revoked, since being entitled to possession of his property in the state of domicile, he is entitled to receive it here. *In re Honeyman*, 117 Misc. Rep. 653, 192 N. Y. Supp. 910, *affd.* 193 N. Y. 939, 202 App. Div. 728.

¶ 110 *Page 567.*

Continuation of subject of not depositing trust funds in personal account.

A bank is not liable to pay as for a conversion where it permits the representative to withdraw funds from the estate bank account established pursuant to the requirements of sec. 231 Sur. Ct. Act, since sec. 222 impliedly authorizes executors to pay expenses by drawing the cash in

order to pay them. *Manufacturers T. Co. v. U. S. Mortgage and T. Co.*, 122 Misc. Rep. 726, 204 N. Y. Supp. 105.

¶ 111 Page 570.

Section 45, Dec. Est. Law, referred to in section 159, Sur. Ct. Act, will be found in ¶ 75.

Representative removed.

Neglect to deposit estate funds in a special account as required by section 231, Sur. Ct. Act, and failure to allow the estate interest on such money, is good ground for denying commissions, not alone to the guilty executor but to co-executor who acquiesced. *Matter of Hutkoff*, 124 Misc. Rep. 703, 209 N. Y. Supp. 588.

¶ 112 Page 572.

Amendment to sec. 161 Sur. Ct. Act, relating to grant of ancillary letters.

§ 161. To whom ancillary letters granted.

Where the will specially appoints one or more persons as the executor or executors thereof, with respect to personal property situated within the state, the ancillary letters testamentary must be directed to the person or persons so appointed, or to those who are competent to act and who qualify. If all are incompetent or fail to qualify, or in a case where such an appointment is not made, ancillary letters testamentary, or ancillary letters of administration, issued as prescribed in this article, must be directed to the person named in the foreign letters or to the person otherwise entitled to the possession of the personal property of the decedent, unless another person applies therefor, and files with his petition, an instrument, executed by the foreign executor or administrator, or person otherwise entitled as aforesaid; or, if there are two or more, by all who have qualified and are acting; and also acknowledged, or proved, and duly certified, authorizing the petitioner to receive such ancillary letters, in which case, the surrogate must, if the petitioner is a fit and competent person, issue such letters directed to him. Where two or more persons are named in the foreign letters, or in an instrument executed as prescribed in this section, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown to the surrogate's satisfaction, the decree so directs. *If the person named in the foreign letters or the person otherwise entitled to the possession of the*

122 SUPPLEMENT TO HEATON'S SURROGATES' COURTS.

personal property of the decedent in the foreign jurisdiction shall, after the service of citation upon him, refuse to qualify or to make the designation by the instrument provided for in this section, the ancillary letters may be issued to the persons named in section one hundred and thirty-three of this act where a will has been probated or established in the foreign jurisdiction, or to the persons named in section one hundred and eighteen of this act where there is no such will. (Amended by Laws 1923, ch. 530. In effect Sept. 1, 1923.)

Page 573.

Amendment to sec. 162 Sur. Ct. Act, directing issue of citation to State Tax Commission.

§ 162. Petition; citation.

An application for ancillary letters testamentary, or ancillary letters of administration, as prescribed in this article, must be made by petition which must set forth the amount of security given on the original appointment, the name and residence of each creditor, or person claiming to be a creditor residing within the state, and the amount of his claim so far as the same may be ascertained. Citation shall thereupon issue to the state tax commission, and to such creditors, and may issue generally to all creditors or persons claiming to be creditors residing within the state. (Amended by Laws 1922, ch. 140, § 1. In effect March 22, 1922.)

¶ 114 *Page 578.*

Continuation of subject of transmission of assets by ancillary representatives.

Where original probate was had in this state of the will of a resident of another state who died in this state, leaving the bulk of his property here, and his legatees being residents of this state, the assets were not transmitted to the foreign state. In such a case the administration here is original, and whether the surrogate should order transmissal of the assets is a matter of discretion to be exercised with an equitable discretion. *Matter of Bliss*, 121 Misc. Rep. 773, 202 N. Y. Supp. 185.

¶ 116 Page 582.

Amendment to Section 160, Decedent Estate Law, permitting a foreign executor or administrator to sue or be sued in this state.

Section 160, Dec. Est. Law, has been amended since 1920 by taking out subdivision 2 added at that time and adding another provision regarding manner of proof of authority.

Amendment to Section 160, Decedents Estate Law, by adding a subdivision authorizing the bringing in of the executor or administrator of a deceased foreign defendant or respondent.

§ 160. Foreign executor or administrator may sue or be sued.

1. An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section forty-five of this chapter; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed.

This section shall not apply where the executor, administrator or representative of the deceased is appointed in a state or territory of the United States or in a foreign country or in an Indian reservation according to the laws thereof, if such state, territory, foreign country or Indian reservation does not have the courts, seals or officers mentioned in section forty-five of this chapter; in which event the proof of the appointment of the executor, administrator or representative of the deceased, according to the laws and customs of such state, territory, foreign country or Indian reservation may be proved upon the trial by any oral or documentary evidence that is satisfactory to the court. (Added by ch. 919, L. 1920, and amended.)

2. *An action or proceeding pending in any court of this state in which the court shall have obtained jurisdiction of the person of a defendant or respondent who is domiciled in any other state, territory or district of the United States or in any foreign country shall, if the cause of action survives, not abate by reason of the death of such defendant or respondent, but his executor or administrator duly appointed in such state, territory or district of the*

United States or foreign country, shall upon the application of the adverse party, and upon such notice as the court may prescribe, be brought in and substituted in the place of the decedent and the action or proceeding shall continue. (Amended by Laws 1925, ch. 603. In effect April 11, 1925. Section 2 added by Laws 1925, ch. 253. In effect April 1, 1925.)

Page 583.

Continuation of subject of actions by and against foreign representatives.

This section includes a foreign corporation in the word "his," and therefore a foreign banking corporation may sue as executor. *St. Louis U. T. Co. v. Hoffstaedter*, 121 Misc. Rep. 762, 202 N. Y. Supp. 71, affd. 209 App. Div. 820, 204 N. Y. Supp. 945.

Page 584.

By the words "foreign executor" or "foreign administrator" the courts mean "foreign" with reference to the origin of the official character, that is the place of appointment, and not the domicile of the representative. *Hopper v. Hopper*, 125 N. Y. 400; *Hill v. Guaranty T. Co.*, 190 N. Y. Supp. 653; appeal dismissed 232 N. Y. 592.

In the *Guaranty Trust Co.* case (*supra*) the service of the summons was set aside under the authority of the *Helme* case (*supra*) although the defendant was a domestic corporation, but it was acting as executor under the will of a resident of Vermont and was appointed there.

Aff. 199 App. Div. 919, 190 N. Y. Supp. 943.

In *Osterling v. Frick*, 116 Misc. Rep. 166, 190 N. Y. Supp. 275, the argument was again taken up that not in all classes of cases could an action be brought against a foreign representative and that section 160, Dec. Est. Law, does not permit a foreign representative to be sued generally.

Action in personam.

Under Dec. Est. Law, § 160, foreign executors of non-

resident defendant in an action *in personam* can not be made defendants in this state in their representative capacity without their consent. *Rogers v. Gould*, 205 N. Y. Supp. 755, 210 App. Div. 15, *affd.* 240 N. Y. 18.

¶ 117 Page 585.

Continuation of subject of accounting by action in Supreme Court.

Nonresident parties.

The court may bring in as parties to an accounting action involving the estate of a resident decedent, nonresident executors and trustees of a deceased executor and trustee who had voluntarily submitted himself to the jurisdiction of the court. *Gould v. Gould*, 211 App. Div. 78, 207 N. Y. Supp. 4, *affg.* 122 Misc. Rep. 152, 203 N. Y. Supp. 399.

¶ 119 Page 594.

Continuation of subject dealing with the right of a depository of securities to receive payment of and re-invest proceeds of securities.

In the *Matter of Hayden*, 120 Misc. Rep. 185, 198 N. Y. Supp. 675, the court at special term directed the custodian to deliver the deposited bonds to the purchaser on receipt of the selling price and to hold the proceeds for application to the purchase of new investments. While this course might be convenient in obviating the necessity for the trustee or guardian to give a bond for the proceeds, there would seem to be a grave question as to how the fund would be protected against the substitution of low grade securities and the negligence of the trustee or guardian.

¶ 121 Page 596.

Amendment to Sur. Ct. Act, relating to release of sureties.

Chapter 584, Laws 1922, repealed sections 109 and 110,

Sur. Ct. Act, and inserted a new section in the place of section 109.

§ 109. Release of surety.

1. The surety or sureties, or the representatives of any surety or sureties, upon the bond heretofore or hereafter executed, or any trustee, guardian, executor, administrator or other fiduciary, taken as prescribed in this act, shall be entitled as a matter of right to be, and shall be, discharged from liability as hereinafter provided, and to that end, on notice to the principal named in such bond, may apply to the court that accepted such bond, praying to be relieved from liability as such surety or sureties, for the act or omission of such principal, occurring after the date of such order relieving such surety or sureties, and that such principal be required to give new surety and to account, whereupon a citation shall be issued citing such principal to attend upon such application. Pending the hearing of such application, the court may restrain such principal from acting except to preserve the trust estate, until further ordered.

2. Upon the hearing of such application, if the principal does not file a new bond in the usual form to the satisfaction of the court, the court must make an order requiring the principal to file a new bond within such reasonable time, not exceeding five days, as the court in such order may fix. If such new bond shall be filed upon such hearing or within the time fixed by such order, the court must thereupon make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order, and to file such account within a time fixed, not exceeding twenty days, and releasing the surety or sureties making such application from liability upon the bond for any act or default of the principal, subsequent to the date of such decree or order. If the principal fail so to file such new bond within the time specified, a decree or order must be made revoking the appointment of such principal or removing him and requiring him to so account and file such account within twenty days.

3. If the principal fail to file his account as in this section provided, such surety or sureties, or the representatives thereof, may make and file such account with like force and effect as though made and filed by such principal, and upon settlement thereof credit shall be given for all commissions, costs, disbursements and allowances to which the principal would be entitled were he accounting, and allowance shall be made to such surety or sureties or representative for the expense incurred in so filing such account and procuring the settlement thereof.

4. After filing the account as required or permitted in this section, the court, upon the petition of the principal or surety or sureties or the representatives of any such surety or sureties, must issue a citation addressed to all persons interested in the estate or trust funds, to show cause at a time and place therein specified, why such account should not be judicially settled; and upon the trust fund or estate being found intact or made good and paid over or

properly secured, the surety or sureties shall be discharged from any and all further liability, and the court shall settle, determine, and enforce the rights and liabilities of all parties to the proceedings. Upon demand made in writing by the principal, such surety or sureties, or the representatives thereof, shall return any compensation that has been paid for the unexpired term of such suretyship. (Inserted by ch. 584, Laws 1922.)

This section now contains substantially the provisions of section 158 of the Civil Practice Act. See pp. 597 to 599.

¶ 122 *Page 602.*

Amendment in relation to reduction of penalty of bond.

Chapter 241, Laws 1923, renumbered section 111, Sur. Ct. Act, and made it section 110, and inserted a new section in relation to reduction of penalty of bonds.

§ 111. Reduction of bond of executor, administrator, guardian or trustee.

At any time, an executor, administrator, administrator with the will annexed, guardian or testamentary trustee who shall have been required to file an official bond may apply to the surrogate's court by which he was appointed, upon the notice hereinafter provided, to have such bond reduced, and the surrogate in his discretion, upon good cause shown, may by order, permit the filing of a new bond in the reduced amount, with new surety or sureties, and provide for the discharge of the former bond and surety or sureties as to liability for matters subsequent to the filing of the new bond. Notice of such application shall be served as follows: personally, not less than eight days before the application is made, on legatees and next of kin residing in the county; by mail, not less than sixteen days before such application, on legatees residing elsewhere in the state and outside of the state. (Inserted by Laws 1923, ch. 241, § 1. Old § 111 renumbered § 110 by Laws 1923, ch. 241, § 1. In effect Sept. 1, 1923.)

Former section 111 (now § 110) restricted the time of the application to that of an intermediate judicial settlement, but under this new section the application can be made at any time, even though no proceeding is pending.

¶ 128 Page 612.

Amendment to sec. 182, Civ. Pr. Act, fixing place of residence of executor or administrator for purpose of determining venue.

§ 182. Place of trial at residence.

An action in the supreme court not specified in the two following sections must be tried in the county in which one of the parties resided at the commencement thereof. *An executor or administrator shall be deemed a resident of the county of his appointment, as well as the county in which he actually resides.* If neither of the parties then resided in the state it may be tried in any county which the plaintiff designates for that purpose in the title of the complaint. (Amended by Laws 1924, ch. 160. In effect immediately.)

¶ 130 Page 619.

Continuation of subject of counterclaim.

Counterclaiming debt due from representative individually.

Where the debts against an estate have been paid, and a representative who is entitled to the whole remaining estate, sues on a claim due the estate, the defendant may counterclaim a debt due from the representative individually. *Anderson v. Carlson*, 201 App. Div. 260, 194 N. Y. Supp. 112; *Blood v. Kane*, 130 N. Y. 514.

¶ 132 Page 624.

Continuation of subject of actions by and against executors.

No control over executor removed.

Where an executor has been allowed to resign or has been removed, the surrogate's court has no power or control over him, and for any wrongdoing he must be prosecuted in another court. *Matter of Schnugg*, 121 Misc. Rep. 289, 200 N. Y. Supp. 911.

¶ 134 Page 626.

Amendment to sec. 284 Sur. Ct. Act, relating to fees of appraisers.

§ 284. Fees of appraiser, referee, juror and witness.

An appraiser is entitled, in addition to his actual expenses, to a sum to be fixed by the surrogate, for *his services* in making the appraisal or inventory.

The appraiser shall file with the surrogate an affidavit showing the nature and extent of his services and expenses, if any; and the sum payable therefor shall be taxed by the surrogate and paid by the executor or administrator.

A referee, juror, or witness is entitled to the same fees for his services and for traveling as are allowed for like services in the supreme court. (Amended by Laws 1923, ch. 521. In effect Sept. 1, 1923.)

Page 628.

Amendment to sec. 1551, Civ. Pr. Act, and to sec. 287 Sur. Ct. Act, relating to fees of printers.

§ 1551. Fees of printers.

Except as otherwise specially prescribed by law, the proprietor of a newspaper is entitled for publishing summons, notice, order or other advertisement, required by law to be published, to five cents per line of a column with not less than twelve pica ems, provided that in computing such charge per line, the line shall average at least six words for each insertion in newspapers having less than seven thousand five hundred circulation; six cents per line for such newspapers having seven thousand five hundred or more circulation and less than ten thousand; seven cents per line for such newspapers having ten thousand or more circulation and less than fifteen thousand; and one cent per line in addition to the seven cents for the initial ten thousand circulation, for each additional five thousand circulation possessed by such newspapers until the maximum rate of twenty cents per line is reached. To all of the above rates two cents per line shall be added to the initial insertion charge of each separate advertisement. To all of the above rates for the initial insertion two cents per line shall also be added for tabular matter or intricate composition. In reckoning line charges allowance shall be made for date lines, paragraph endings, titles, signatures and similar short lines as full lines where the same are set to conform to the usual rules of composition. Display advertising shall be charged agate measurement (fourteen lines to each inch), twelve to thirteen pica ems wide, depending on the makeup of the paper publishing such copy. This rate shall not apply to cities of the first class where the legal rate for such publication shall be at the rate of twenty cents per agate line. (Amended by Laws 1925, ch. 494. In effect April 9, 1925.)

§ 287. Fees of printers.

Except as otherwise specially prescribed by law, the proprietor of a newspaper is entitled for publishing notice, order, citation or other advertisement, required by this chapter to be published, to five cents per line of a column width not less than twelve pica ems, provided that in computing such charge per line, the line shall average at least six words, for each insertion in newspapers having less than seven thousand five hundred circulation; six cents per

line for such newspapers having seven thousand five hundred or more circulation and less than ten thousand; seven cents per line for such newspapers having ten thousand or more circulation and less than fifteen thousand; and one cent per line in addition to the seven cents for the initial ten thousand circulation, for each additional five thousand circulation possessed by such newspapers until the maximum rate of twenty cents per line is reached. To all of the above rates two cents per line shall be added to the initial insertion charge of each separate advertisement. To all of the above rates for the initial insertion two cents per line shall also be added for tabular matter or intricate composition. In reckoning line charge allowance shall be made for date lines, paragraph endings, titles, signatures, and similar short lines as full lines where the same are set to conform to the usual rules of composition. Display advertising shall be charged agate measurement, twelve to thirteen pica ems wide, depending on the makeup of the paper publishing such copy. This rate shall not apply to cities of the first class where the legal rate for such publication shall be at the rate of twenty cents per agate line. (Amended by Laws 1925, ch. 494. In effect April 9, 1925.)

¶ 135 Page 628.

Amendment to sec. 285 Sur. Ct. Act, increasing the rate of commissions.

§ 285. Commissions of executor, administrator, guardian or testamentary trustee.

On the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate must allow to him his just, reasonable and necessary expenses actually paid by him, and if he be an attorney and counselor-at-law of this state, and shall have rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable; and in addition thereto the surrogate must allow to such executor, administrator, guardian or testamentary trustee for his services in such official capacity, and if there be more than one, apportion among them according to the services rendered by them respectively.

For receiving and paying out all sums of money not exceeding *two thousand dollars*, at the rate of five per centum.

For receiving and paying out any additional sums not amounting to more than *twenty thousand dollars*, at the rate of two and one-half per centum.

For receiving and paying out any additional sums not exceeding twenty-eight thousand dollars at the rate of one and one-half per centum.

For all sums above *fifty thousand dollars*, at the rate of *two per centum*.

The value of any real or personal property, to be determined in such manner as the surrogate may direct, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions. But this shall not apply in case of a specific legacy or devise.

In addition to the compensation hereinbefore provided the court in its dis-

cretion may allow to a guardian of the person a sum of money to be fixed by it and paid by the guardian of the property out of the funds in his hands, which sum shall be for services of such guardian of the person up to the time of such allowance.

If an executor acting as trustee, or if a trustee or guardian, is required to receive income and pay over the same, and such executor, trustee or guardian pays over said income and renders an annual account to the beneficiary of all his receipts and disbursements on account thereof, he shall be allowed, and may retain, the same commission on the amount so accounted for as he would be allowed upon principal on a judicial settlement; if he does not render such annual account, he shall be allowed, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary.

If the gross value of the principal of the estate or fund accounted for amounts to one hundred thousand dollars or more, each executor, administrator, guardian or testamentary trustee is entitled to the full compensation on principal and income allowed herein to a sole executor, administrator, guardian or testamentary trustee, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively. Where the will provides a specific compensation to an executor, administrator, guardian or testamentary trustee, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, within four months from the date of his letters, or in case of a testamentary trustee or guardian, from the date of his filing his oath, he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary or letters of general administration, are issued to a person who has previously been appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity.

Where a trustee or executor is, by the terms of the instrument, required to collect the rents and manage real property, he shall be allowed and may retain, five per centum of the rents collected therefrom, in addition to the commissions herein provided. (Amended by Laws 1923, ch. 649. In effect Sept. 1, 1923.)

This amendment increases commissions so they will be computed as follows:

\$2,000 at 5 per cent.

\$20,000 at 2½ per cent.

\$28,000 at 1½ per cent, and all sums over \$50,000 at 2 per cent.

For managing and collecting rents of real property, 5 per cent on amount of rent collected.

Effective when decree is made after Sept. 1, 1923.

The law in force at the time of the making of the decree allowing commissions is the law which governs the allowance. No person is entitled to commissions until they are allowed by the decree. See ¶ 143, page 653, Suppl.

Effect of decree under former rates.

The increased rate under the amendment of 1923 can not be allowed when a final decree was made before that date fixing commissions, even to trustees, when a later accounting is had. The former decree is *res adjudicata* on the question of the rate of commissions. *Matter of Barrett*, 124 Misc. Rep. 699, 209 N. Y. S. 678; *Matter of Nickel*, 209 N. Y. S. 677.

¶ 136 Page 634.

Addition to subject of commissions on rents under amendment of 1923.

In deciding *Matter of Althause*, 122 Misc. Rep. 279, 203 N. Y. Supp. 617, under the amendment of 1923 giving executors compensation for collecting rents, Mr. Surrogate Foley said:

“The language of this amendment raises three questions: (1) Is the 5 per cent. commission meant to include the compensation actually paid to an agent for the collection of rents? (2) Is it additional compensation to be paid to the executor when he collects the rents personally and no agent is employed? (3) Where an agent is employed is it additional compensation to which the executor or trustee is entitled exclusive of the charges of the agent? I think it was the clear legislative purpose that this additional allowance was intended to include any charge made by the agent employed by the executor to collect the rents. There was merely incorporated in the statute the previous custom of allowing, in the executor's accounting, the agent's commissions as an expense of administration. Where such charges are necessary and reasonable they are allowed. *Matter of Binghamton Trust Co.*, 87 App. Div. 26, 83 N. Y. Supp. 1068. In other words, if the rent collector was employed, it is in the form

of a reimbursement; if he was not employed, and the collection of rents is made by the executor, it is additional compensation for the extra work. Where the broker was employed, the legislature did not intend to allow to the executor an arbitrary 5 per cent. upon the gross rentals in addition to the regular commissions of the executor and the broker's charges."

To earn the extra compensation of 5 per cent the trustee must have the active charge of taking care of the physical property, paying taxes, and securing tenants. Fees paid an agent for such services must be deducted if the commissions are allowed. *Matter of Knight*, 124 Misc. Rep. 430, 208 N. Y. Supp. 822.

Page 635.

Continuation of subject of commissions on unsold real estate.

Where a power of sale is given the executor, but is never exercised, and the real estate never comes into the possession or control of the executor, he is not entitled to commission on the value thereof. *Matter of Seiss*, 119 Misc. Rep. 521, 197 N. Y. Supp. 511.

Page 638.

Continuation of subject of commissions on proceeds of business conducted by representatives.

In the case of a business conducted by the executors or trustees, commissions can be computed on the net income only which comes to the *corpus* of the estate as an increase thereof.

The amendments of 1916 and 1921 have not changed the rule in the Beard case (140 N. Y. 260), since where no profit is made there is no increment or increase of the estate to go to the persons interested. *Matter of Sidenberg*, 204 App. Div. 255, 197 N. Y. Supp. 767.

¶ 143 Page 653.

Continuation of subject of under what laws commissions are to be allowed.

The increase in the percentage which may be allowed as commissions made in section 285, Sur. Ct. Act, as amended in 1923 (see ¶ 135 Supplement), should be allowed whenever a decree allowing commissions is made after that law takes effect. This rule was apparently settled in *Matter of Bearns*, 188 App. Div. 215, and in *Matter of Barker*, 230 N. Y. 364.

In 1923 Surrogate Foley had before him the question whether commissions should be allowed at the increased rate under an amendment taking effect September 1, 1923, when the proceeding for a judicial settlement was begun before that date, and he held that the law in force at the date of making the decree was the law which established the rate of commissions. *Matter of King*, 121 Misc. Rep. 530, 201 N. Y. Supp. 239, followed 122 Misc. Rep. 280, 203 N. Y. Supp. 619.

Deceased representative.

In a case where the representative died before the amendment increasing the rate was adopted, the granting of compensation as commissions being in the discretion of the surrogate, the old rate was the measure and not the new. *Matter of Rosenberg*, 124 Misc. Rep. 434, 207 N. Y. Supp. 557.

Page 654.

Continuation of subject of assignability of commissions.

They can not be, by agreement, paid to another even for services rendered to the executor, nor can such person recover therefor on a *quantum meruit*, when the services were rendered under an agreement to receive the fees in payment, as such contract is illegal. *Peck v. Sands*, 119

Misc. Rep. 804, 198 N. Y. Supp. 313. See reversal of this case 201 N. Y. Supp. 931, 207 App. Div. 879, *affd.* 238 N. Y. 565, on authority of *Matter of Snyder*, 190 N. Y. 66.

¶ 146 Page 660.

Continuation of general subject of commissions.

Effect of specific legacies in computing value of estate.

The value of specific legacies must be deducted from the gross value of the estate to determine whether the estate has a gross value of \$100,000 in determining whether two or more executors are entitled to full commissions. *Matter of Story*, 121 Misc. Rep. 772, 202 N. Y. Supp. 184.

¶ 153 Page 681.

Amendment to Section 278, Sur. Ct. Act, increasing per diem costs, and (1925) providing for allowance of costs after appeal.

§ 278. When surrogate to fix amount of costs.

The surrogate, upon rendering a decree, may, in his discretion, fix such a sum as he deems reasonable, to be allowed as costs, to the petitioner, and to any other party who has succeeded in a contest, or whose attorney, in the absence of a contest, has rendered services in the proceeding of substantial benefit to him, or to the estate or fund, not exceeding, where there has not been a contest, twenty-five dollars, or where there has been a contest, seventy dollars; and in addition thereto, where a trial or hearing upon the merits necessarily occupies more than one day, twenty-five dollars for each additional day, necessarily occupied in the trial or hearing and in preparing therefor, and where a motion for a new trial is made, if it is granted, twenty-five dollar; if it is denied, fifteen dollars.

When the decree is made upon a contested application for probate of a will, costs, payable out of the estate or otherwise, shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant or incompetent, appointed by the surrogate, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent; but where a person named as the executor in a will propounds the will for probate, such person so named as executor may, whether successful or not, in the discretion of the surrogate, be awarded costs and all necessary disbursements made by him and all expenses incurred in the attempt to sustain the will. The surrogate may order a copy of the stenographer's minutes to be furnished to the contestant's counsel, and charge the expense thereof to the estate, if he shall be satisfied that the contest is made in good faith.

When the decree is made after appeal, pursuant to the direction of the appellate court, the surrogate may, in his discretion, allow to an executor, administrator, guardian or trustee such sum as the surrogate deems reasonable for his counsel fees and other expenses necessarily incurred on such appeal. (Amended by Laws, 1925, ch. 581, § 1. In effect Sept. 1, 1925.)

Proponent not an executor.

Where the proponent is a legatee he is not entitled to costs under this section. *Matter of Parsons*, 121 Misc. Rep. 747, 202 N. Y. Supp. 190, affd. 202 N. Y. Supp. 942, 208 App. Div. 769, 236 N. Y. 580.

See ¶ 158 Supp.

Attorneys for adult parties.

Under this section allowance may, in a proper case, be made to attorneys for adult contestants. Because the same attorneys appear for several contestants, the statute does not contemplate the multiplication of allowances where the parties are similarly situated and their interests are not adverse. *Matter of Rosenberg*, — App. Div. —, 209 N. Y. S. 315. See also 208 App. Div. 707, 202 N. Y. S. 324.

The allowance should be based on an affidavit showing the amount of time spent and the character of services rendered, and an allowance will not be sustained in the absence of such information furnished to the court. *Matter of Rosenberg*, — App. Div. —, 209 N. Y. Supp. 315. See also ¶ 21 Supp. for § 231-a, Sur. Ct. Act, giving authority to fix attorneys' compensation.

¶ 156 Page 690.

Amendment to sec. 279, Sur. Ct. Act, designating the additional allowance "as costs" and omitting the statement that it is for his counsel fees and other expenses."

§ 279. Additional allowance in settling account.

In addition to the sums specified in the last section, the surrogate may, in his discretion, allow *as costs* to an executor, administrator, guardian, or testa-

mentary trustee, upon a judicial settlement of his account, or on an intermediate accounting required by the surrogate, such a sum, as the surrogate deems reasonable, not exceeding twenty-five dollars for each day necessarily occupied in preparing his account for settlement and in drawing, entering and executing the decree. (Amended by Laws 1924, ch. 415. In effect immediately.)

¶ 158 Page 697.

Continuation of subject of costs after appeal. See ¶ 153 Supplement.

Application may be made to appellate court to construe decision as to costs.

Where the meaning of the decision or order of the appellate court is not clear as to the allowance of costs, application should be made to that court for specific directions. *Fulton v. Krull*, 151 App. Div. 142, 895; *Matter of Perry*, 131 App. Div. 284, 113 N. Y. Supp. 744.

Meaning of decision or order "with costs."

Where there is an affirmation or reversal "with costs," costs in the appellate court are intended and not costs in the lower court, for example, where no costs were allowed in the lower court. *Matter of Wright*, 89 Misc. Rep. 108, 151 N. Y. Supp. 378; *Matter of Morgan*, 60 Misc. Rep. 298, 113 N. Y. Supp. 276.

Page 698.

Compare the statement made that costs of defending a final decree on appeal can not be awarded from the funds as fixed by the final decree, with the amendment of 1925 to section 278, Sur. Ct. Act, which permits an allowance of costs where a decree after appeal is made by direction of the appellate court. See ¶ 153, Supp.

¶ 159 Page 701.

Continuation of general subject of appeal.

Appeal, effect of decision on parties not appealing.

The decision of an appeal inures to the benefit of all the parties similarly situated whether or not they also appeal. *Union Trust Co. of N. Y. v. Cole*, 198 App. Div. 539, 190 N. Y. Supp. 858.

¶ 163 Page 708.

Continuation of subject of appeal from pro forma order in transfer tax proceeding.

The appeal can not be used for the purpose of modifying the orders so as to direct the refund of a tax previously paid, or to exonerate the executors or trustees from personal liability for the tax, or to enforce the issuance of a waiver for the transfer of securities. Such relief must be obtained by mandamus or by other appropriate proceeding.

Matter of Bonaparte, 208 N. Y. Supp. 318.

Matter of Coogan, 27 Misc. Rep. 563, 59 N. Y. Supp. 111, *affd.* 162 N. Y. 613.

People ex rel. Metropolitan Trust Co. v. Travis, 191 App. Div. 129, 180 N. Y. Supp. 659.

Unless appealed from the order is final against all the parties who had due notice as far as it relates to the tax due the state, but of course it is not an adjudication upon any of the matters reported and found except in such proceeding and for such purpose.

¶ 168 Page 714.

Continuation of subject relating to findings by surrogate.

In re Appell, 199 App. Div. 574, 192 N. Y. Supp. 131, appeal dismissed 234 N. Y. 601, in a case appealed from a

decree of the surrogate upon report of a referee, the court said that it was not now necessary for the surrogate to make findings, an appeal from a decree brought the entire record before the court.

¶ 171 Page 721.

Continuation of subject of power of appellate court to make a new decision.

While in actions at law the appellate division can not render final judgment where the trial has been before a jury unless there has been a motion to direct a verdict (§ 584 C. P. A.), that rule does not apply to appeals from verdicts of jury in Surrogate's Court, and final judgment may be directed admitting a will in a proper case, where a verdict against the validity of the will is set aside. *Matter of Burnham*, 234 N. Y. 475.

¶ 174 Page 728.

Additions to general subject of rules of Surrogate's Courts.

Albany County.—George Lawyer, Surrogate; Charles M. Friend, Clerk—Albany, N. Y.:

“All citations issued by this court must be returned to the Clerk of the Court with proof of service at least twenty-four hours prior to the return hour named therein, and in the event a citation is made returnable on a Monday, the proof of service must be delivered to the Clerk on Friday of the preceding week.”

¶ 175 Page 1111.

Continuation of discussion of right of surviving spouse or next of kin to control burial and erect monument instead of executor or administrator.

Where the representative seeks to control the selection

and erection of a monument against the wishes of the surviving spouse or next of kin an injunction may be granted.

This right of possession and burial carries with it the right of placing over the grave a proper monument or memorial. *Matter of Richardson*, 29 Misc. Rep. 367-369; 60 N. Y. Supp. 539; *Birch v. Birch*, 123 Misc. Rep. 229, 204 N. Y. Supp. 735, *affd.* 205 N. Y. Supp. 913, 209 App. Div. 861.

¶ 176 Page 1116.

Amendment to Poor Law relating to burial of soldiers, sailors and marines.

§ 84. Burial of soldiers, sailors or marines.

The board of supervisors in each of the counties or *the board of estimate and apportionment of the city of New York* shall designate some proper person, *association*, or commission, other than that designated for the care of poor persons, or the custody of criminals, who shall cause to be interred the body of any honorably discharged soldier, sailor, or marine, who has served in the military or naval service of the United States, or the body of the wife or widow of any soldier, sailor or marine, married to him previous to nineteen hundred and eighteen, who shall die such widow, and who shall hereafter die without leaving sufficient means to defray his or her funeral expenses, but such expenses shall in no case exceed *one hundred* dollars. If the deceased has relatives or friends who desire to conduct the burial, but are unable or unwilling to pay the charge therefor, such sum shall be paid by the county treasurer or *other fiscal officer* to the person, *association* or *commission* so conducting such burial upon due proof of the claim, made to such person, or commission of the death and burial of the soldier, sailor or marine, or the wife or widow of such soldier, sailor or marine, and audit thereof. Such interment shall not be made in a cemetery or cemetery plot used exclusively for burial of poor persons deceased, and the board of supervisors of each county is hereby authorized and empowered to purchase and acquire lands, or to appropriate money for the purchase and acquisition of lands, for a cemetery or cemetery plot for the burial of any such honorably discharged soldiers, sailors or marines and their wives and widows and also to provide for the care, maintenance, or improvement of any cemetery or plot where such honorably discharged soldiers, sailors or marines and their wives and widows are buried or may hereafter be buried. (Amended by Laws 1919, ch. 110; Laws 1923, ch. 484, § 1. In effect May 21, 1923.)

¶ 177 Page 1120.

Continuation of subject of right of executor or administrator concerning insurance on buildings.

The personal representative of the deceased may, if a loss occurs at or about the time of death, collect and hold the insurance in trust for the heir or devisee. Where the land with buildings is given for life and then in remainder, the executor may receive the insurance money, and should deposit it in bank at interest, paying the interest to the life tenant and preserving the principal for the remainderman. *Matter of Mullin*, 121 Misc. Rep. 867, 202 N. Y. Supp. 758.

¶ 179 Page 1125.

Action by one or all of trustees.

It seems to be well established that where the acts of trustees call for exercise of discretion and judgment the concurrence of all is necessary.

Cooper v. Ill. Cent. R. R., 38 App. Div. 22, 28, 57 N. Y. Supp. 925.

Fritz v. City Trust Co., 72 App. Div. 532, 76 N. Y. Supp. 625, *affd.* 173 N. Y. 622.

Matter of Dorland, 100 Misc. Rep. 236, 166 N. Y. Supp. 616.

Matter of Johnson, 123 Misc. Rep. 66, 207 N. Y. Supp. 66.

One executor making note.

Claim against an estate. One executor gave a promissory note in settlement signed "Estate of Charles Rosenberg for Barbara Rosenberg, executrix." The other executors neither co-operated in making the note nor ratified it. Under such facts the note is not binding on the estate.

Union Bank of Brooklyn v. Sullivan, 214 N. Y. 332, 343, 344.

Bailey v. Spofford, 14 Hun, 86.

Hammon v. Huntley, 4 Cow. 493, 494, 495.

These authorities are not opposed to *Barry v. Lambert*, 98 N. Y. 300; *Rosenberg v. Rosenberg*, 240 N. Y. 125, rev'ing 209 App. Div. 864, 205 N. Y. Supp. 949.

¶ 184 Page 1139.

Continuation of discussion of jurisdiction in discovery proceedings.

The court of appeals has recently considered the question of jurisdiction in *Matter of Hyam*, 237 N. Y. 211, in which the court said:

“Under the sections of the Surrogate's Court Act to which reference has been made, it will be observed that the proceeding is limited to an inquiry concerning ‘money or other personal property’ which should be delivered to the executor. At the conclusion of the hearing the decree terminating the proceeding can only direct the delivery of specific money or personal property which belonged to the deceased in his lifetime. If such property has been exchanged for other property, or sold, then the surrogate's court has no power to direct that the same be turned over to the executor. *Matter of Heinze*, 224 N. Y. 1. The surrogate's court is a court of limited jurisdiction. It has only such power as is conferred upon it by statute. It has not been given power to determine the title, or the right to possession, of any property other than that which belonged to the deceased in his lifetime.

It is suggested that when sections 205 and 206 are read in connection with section 40 of the Surrogate's Court Act, it has the power to determine all matters necessary to be determined in order to make a full, equitable, and complete disposition of the matter involved. Section 40 does not enlarge the powers of the surrogate's court in so far as the same relate to a discovery under sections 205 and 206. These sections point out specifically what must be done to obtain the discovery. An inquiry may be had concerning specific personal property. The inquiry is in terms limited to specific personal property which was owned by the decedent in his lifetime, and before a decree can be entered under section 206, it must appear that the petitioner is entitled to the possession of the specific property withheld. No decree can be entered directing the disposition of other property or proceeds derived from property in case a sale has been made. The right of an executor or administrator to compel discovery of a decedent's property is not of recent origin. It has existed for many years, as indicated by legislation and decisions upon the subject. It was not, however, until the amendment of 1914 (chapter 443) that title to property, the possession of which was sought, could be tried. If a

verified answer were interposed denying the right to the possession of the property specified, then until the amendment of 1914 the proceeding had to be dismissed. *Matter of Walker*, 136 N. Y. 20."

Since this decision was made, and probably as a result of it, sections 205 and 206 have been amended, so that the right is given to maintain a proceeding to discover proceeds or value of property which belonged to the estate or which has been converted and to direct payment therefor. Section 40 on general jurisdiction has also been amended accordingly. *Matter of Cafer*, 121 Misc. Rep. 292, 200 N. Y. Supp. 906.

Page 1141.

Right to trial with jury.

Where in the Surrogate's Court a party has been served with an order for examination in discovery proceedings, has appeared and filed an answer setting up an issue of title, has been examined, and on such examination facts appear which should satisfy the surrogate that there is a genuine and bona fide issue of legal title, then the constitutional right of trial by jury exists. *Matter of Nutrizio*, 206 N. Y. Supp. 706.

¶ 185 Page 1142.

Amendments to sec. 205, Sur. Ct. Act, by making it apply to guardians (1923) and with reference to compelling payment for property withheld (1924).

§ 205. Proceedings to discover property withheld.

An executor, administrator or guardian may present to the surrogate's court from which letters were issued to him, a petition setting forth on knowledge, or information and belief, any facts tending to show that money or other personal property, or the proceeds or value thereof, which should be delivered or paid to the petitioner, or included in an inventory or appraisal, is in the possession, under the control or within the knowledge or information of a person who withholds the same from him, whether such possession or control was obtained in the lifetime of a decedent or subsequent to his death; or who

refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor, administrator or guardian in making discovery of such property, and praying an inquiry respecting it, and that the respondent may be ordered to attend the inquiry and be examined accordingly, and to deliver the property if in his control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the surrogate is satisfied, on the papers so presented, that there are reasonable grounds for the inquiry, he must make an order accordingly, which may be made returnable forthwith, or at a future time fixed by the surrogate, and may be served at any time before the hearing. Service thereof must be made by delivery of a certified copy thereof to the person or persons named therein and the payment, or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in surrogate's court. (Amended by Laws 1924, ch. 100. In effect Sept. 1, 1924.)

Page 1144.

Amendment to sec. 206, Sur. Ct. Act, concerning decree where payment is directed for property withheld.

§ 206. Trial and decree.

If the person directed to appear submits an answer denying any knowledge concerning, or possession of, any property which belonged to the decedent, or *any property of the estate*, or shall make default in answer, he shall be sworn to answer truly all questions put to him touching the inquiry prayed for in the petition. If it appears that the petitioner is entitled to the possession of the property, the decree shall direct delivery thereof to him, or *if the estate property shall have been diverted or disposed of the decree may direct payment of the proceeds or value of such property or may impress a trust upon said proceeds or make any determination which a court of equity might decree in following trust property or funds*. If such answer alleges title to or the right to possession of any property involved in the inquiry, the issue raised by such answer shall be heard and determined and a decree made accordingly. (Amended by Laws 1924, ch. 100. In effect Sept. 1, 1924.)

Page 1145.

Continuation of subject of receiving proceeds of industrial insurance.

In discussing this subject Mr. Surrogate Schulz has said:
 "This provision in industrial insurance policies is for the protection of the companies. It does not 'grant or take

away a cause of action from any person.' (*Wachtel v. Harrison*, 84 Misc. Rep. 76, 145 N. Y. S. 982; *Ruoff v. John Hancock Mutual Life Ins. Co.*, 86 App. Div. 447, 83 N. Y. S. 758; *Wokal v. Belsky*, 53 App. Div. 167, 65 N. Y. S. 815); so that the fact that the death benefit was paid to the respondent, standing alone, did not give her title thereto as against the estate of the decedent." *Matter of Degenhardt*, 123 Misc. Rep. 762, 206 N. Y. Supp. 220.

Where, however, the insured had attempted to change the beneficiary, but the company had not approved the change, the company not having raised the question but having made payment to the person so named, the court may confirm such payment.

Matter of Degenhardt, 123 Misc. Rep. 762, 206 N. Y. Supp. 220.

Luhrs v. Luhrs, 123 N. Y. 367.

Southern Tier Masonic Relief Ass'n v. Laudenschach, 5 N. Y. Supp. 901.

White v. White, 194 N. Y. Supp. 114.

Page 1146.

Continuance of subject of right to maintain discovery proceeding. When dismissed.

The proceeding should be dismissed when it appears that the object of the proceeding is to obtain evidence for use in another court. *Matter of Denham*, 182 N. Y. Supp. 90.

Page 1147.

Continuation of subject "Effect of answer" in discovery proceedings.

An answer which denies possession by the respondent and the ownership by the petitioner, does not raise an issue which makes the proceeding a "trial." The respondent may select his own forum and can not be compelled to raise

the issue of title in a discovery proceeding. *Matter of Carney*, 119 Misc. Rep. 104, 196 N. Y. Supp. 105, aff. 199 N. Y. Supp. 914, 206 App. Div. 734.

Where the answer alleges that the respondent received the property in question from the decedent as a gift, the answer alleges title and a trial should be had. In such a trial the burden of proof is upon the respondent who claims title by gift. *Matter of Crook*, 190 N. Y. Supp. 285.

¶ 186 Page 1148.

Continuation of subject of burden of proof when gift is claimed.

Where the respondent claims a gift from decedent, the burden of proof is on the respondent. *Matter of Degenhardt*, 123 Misc. Rep. 762, 206 N. Y. Supp. 220; *Matter of Hepner*, 123 Misc. Rep. 758, 206 N. Y. Supp. 217.

Where the representative is accounting and claims a part of the property as a gift the burden of proof is upon the party making such claim, and, while only a fair preponderance of evidence is necessary, such evidence must be clear and convincing.

Matter of Housman's Estate, 224 N. Y. 525.

Matter of Van Alstyne, 207 N. Y. 298.

Rosseau v. Rouss, 180 N. Y. 116.

Matter of Schroeder, 113 App. Div. 204, 210, 99 N. Y. S. 176.

Matter of Hepner, 123 Misc. Rep. 758, 206 N. Y. Supp. 217.

Continuation of subject of burden of proof in discovery proceedings.

Burden of proof is discussed in *Matter of Tipple*, 118 Misc. Rep. 430, 194 N. Y. Supp. 571, and in *Matter of Crook*, 190 N. Y. Supp. 285.

The burden of proof in a discovery proceeding is upon the respondent who sets up a gift.

Matter of Cafer, 121 Misc. Rep. 292, 200 N. Y. Supp. 906.

Matter of Housman, 224 N. Y. 525.

Matter of Caufield, 176 App. Div. 554, 163 N. Y. Supp. 191.

Matter of Humphrey, 183 N. Y. Supp. 133.

¶ 194 Page 1175.

Continuation of subject of assets in joint property.

In considering whether there is joint property that should be taken possession of by the representative, joint property is not confined to bank deposits, but generally the rules relating to joint ownership of bank deposits may be applied to such ownership of other personal property, except that there is a special rule created by section 249 of the Banking Law. *Matter of Kimball*, 124 Misc. Rep. 181, 207 N. Y. Supp. 757.

§ 66. Real property law.

Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy * * *.

This rule also applies to personal property. *Matter of Kimberly*, 150 N. Y. 90; *Matter of Kimball*, 124 Misc. Rep. 181, 207 N. Y. Supp. 757.

¶ 196 Page 1189.

Continuation of subject of proceeds of insurance as assets. See also ¶ 198.

Debt payable from proceeds.

Where the husband reserves the right to change the beneficiary or other control over the proceeds, a debt due

the company which is a lien on the policy must be paid from the proceeds and not by the husband's estate. *Wagner v. Thierot*, 118 Misc. Rep. 511, 194 N. Y. Supp. 610; aff. 203 App. Div. 757, 197 N. Y. Supp. 560, affd. 236 N. Y. 588.

¶ 198 Page 1197.

Group insurance for benefit of employee or beneficiary.

An employee for whose benefit group insurance is taken, who has designated his wife as beneficiary, has a right to rely upon the general law that his wife, or her estate if she predeceases him, can not be deprived of the proceeds without her action. *Matter of Johnson*, 124 Misc. Rep. 498, 208 N. Y. Supp. 655.

¶ 199 Page 1199.

Continuation of subject of partnership.

Jurisdiction to determine fact of partnership.

Where all the interested parties and the fund in question are before the court, and the issue is raised as to whether two of the parties were partners, the surrogate has jurisdiction to determine the issue. *Matter of Van Buren (Decker's Est.)* 204 App. Div. 138, 198 N. Y. Supp. 297.

¶ 202 Page 1210.

Addition to subject of partnership debts and individual debts.

Credit of partnership dividends on claim presented against an estate.

Where dividends have been paid on partnership debts by the surviving partner, the preponderance of authority is in favor of the view that its creditor has the right to prove his claim against the estate and receive dividends upon his entire debt.

Evertson v. Booth, 19 Johns. 486.

People v. Remington, 121 N. Y. 328.

McGrath v. Carnegie Trust Company, 221 N. Y. 92.

People v. Granite State, 161 N. Y. 492.

Matter of Simpson, 36 App. Div. 562, 55 N. Y. S. 697.

Matter of Seybel, 124 Misc. Rep. 297, 207 N. Y. Supp. 765.

¶ 209 Page 1227.

Continuation of subject of conversion and intention.

An intention to convert may be manifest in several ways: First by a positive direction; second, by the necessity of sale in order to carry out the general scheme of the testator; third, when the purpose of the testator would fail without such a conversion. *Phoenix v. Trustees of Columbia C.*, 87 App. Div. 444, 84 N. Y. Supp. 897, *affd.* 179 N. Y. 592; *Matter of Ham*, 123 Misc. Rep. 889, 206 N. Y. Supp. 508.

¶ 211 Page 1230.

Continuation of subject of duty of representative to discover debts. See also ¶ 214.

Where the representative has knowledge of the existence of a claim, he does not act in good faith in distributing the estate without actual notice to the alleged creditor. *Matter of Ebenstein*, 116 Misc. Rep. 543, 190 N. Y. Supp. 764. This may be given by citing the alleged creditor on judicial settlement, or by serving him with a notice to present his claim within a certain time if the time for presentation or the one year has expired.

¶ 212 Page 1233.

Amendment to sec. 207 Sur. Ct. Act, relating to publishing notice to creditors in cases where representative dies or is removed.**§ 207. Notice to creditors; affidavit of claimant; proof of contingent claim.**

The executor or administrator at any time after the granting of his letters, may insert a notice once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. *In the event the executor or administrator dies, resigns or is removed from office, or the newspaper in which such notice is published suspends publication, during the period such notice is required to be published, a new notice shall be published, as the surrogate directs, for the length of time required to complete the six months' publication of such notice.* In any county containing wholly within its boundaries a city of the first class or a city of the second class, such notice may be inserted once in each alternate week for a period of twenty-six weeks. The executor or administrator may require satisfactory vouchers in support of any claim presented and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of the claimant.

Whenever at the death of any person there shall be a contingent or unliquidated claim against his estate, or an outstanding bond, recognizance or undertaking upon which the deceased shall have been principal, surety, or indemnitor and on which at the time of his death the liability is still contingent or unliquidated, a claimant or a surety shall have the right to file with the executor or administrator of the estate of the deceased on or before the day named in the notice provided for in this section, an affidavit setting forth the facts upon which such contingent or unliquidated liability is based and the probable amount thereof, and there shall be no distribution of the assets of said estate without the reservation of sufficient moneys to pay such contingent or unliquidated claim when the amount thereof is finally determined. If before a final judicial accounting and a decree thereon such contingent or unliquidated claim or liability shall have become fixed and liquidated, then evidence of the same may be filed with the executor or administrator of the estate of the deceased in lieu of the contingent claim provided for; and such claim as fixed and liquidated shall be a debt of such estate. If such contingent or unliquidated claim has not become so fixed and liquidated, the decree on a final accounting shall direct that a sum sufficient to satisfy the claim, or the proportion to which it is entitled, be retained in the hands of the accounting party for such period or periods as the court may deem proper for the purpose of being applied to the payment of such claim when fixed and liquidated; and that so much of such sum as is not needed for such purpose

be afterwards distributed according to law. (Amended by Laws 1923, ch. 234. In effect Sept. 1, 1923.)

See ¶ 228, Supp. where the remedy on a claim under a bond and mortgage made by deceased is discussed as a possible contingent claim.

¶ 220 Page 1251.

Continuation of subject of establishing claims.

A claim against an estate is established in several ways:

1. By its admission or allowance by the representative, whether paid or not.
2. By obtaining a judgment against the representative.
3. By proof on the judicial settlement or in any other authorized proceeding.

Matter of Nelson, 63 Misc. Rep. 627, 118 N. Y. Supp. 673; Sur. Ct. Act, § 210.

Page 1253.

Continuation of subject of bad faith in allowing or paying a claim.

Burden of proof.

The burden is on the objectors to show bad faith and fraud in allowing and paying a claim. *Farrell v. Farrell*, 206 App. Div. 209, 200 N. Y. Supp. 561.

Representative may allow a claim and file it on judicial settlement.

Allowance may be contested.

It is well settled that, whenever a claim is presented to and allowed by an administrator or an executor, it *prima facie* establishes the validity of the claim in favor of the party presenting it, and the burden of showing that the claim is not a valid debt against the estate is upon the party who objects to the payment. *Matter of Warrin*, 56 App. Div. 414, 67 N. Y. S. 763; *Matter of Goepel*, 200 App. Div. 678, 193 N. Y. S. 681; *Farrell v. Farrell*, 206 App. Div. 209,

200 N. Y. S. 561. From these cases it would seem that it is only necessary for the administrator to file the verified claims with the court and state that he had allowed them. In the absence of further evidence by the contestant that such claims were fraudulently or negligently allowed, the court would ordinarily confirm the allowance of the same and direct that they be paid. *Matter of Fitzpatrick*, 123 Misc. Rep. 779, 206 N. Y. Supp. 498.

¶ 221 Page 1256.

Continuation of subject of compromise of issues in will contest and distribution of estate thereunder. See ¶ 357.

Under this statute the designated executor may, during the pendency of a will contest, present a petition as therein provided, but the agreement of compromise must be first signed by all parties in interest. Provision is made for the appointment of special guardians for infants, lunatics, unknown persons, persons not in being, etc., so that an agreement in writing pursuant to this section may be made valid and binding upon all such interests, if found by the court to be just and reasonable. *Matter of Fields*, 186 N. Y. Supp. 526 (N. Y. Sur.).

See the opinion and report of the special guardian (*Matter of Watson*, 124 Misc. Rep. 216, 207 N. Y. Supp. 265), for many suggestions as to the contents of such report. The procedure adopted in that important case was that outlined in *Matter of Bemis*, 116 Misc. Rep. 516, 190 N. Y. Supp. 269.

The application for approval is a new proceeding.

The application for the approval of the agreement of compromise is not a part of the original proceeding, but on the filing of the petition a citation or order to show cause must be issued to all the persons interested in the application and a special guardian appointed when nec-

essary. *Matter of Bemis*, 116 Misc. Rep. 516, 190 N. Y. Supp. 269.

Agreement enforceable.

Agreements involving abandoning a contest of a will, and for a distribution of the estate in a different manner than made in the will are enforceable. *Schoonmaker v. Gray*, 208 N. Y. 209.

¶ 223 Page 1261.

Continuation of subject of "Action on rejected claim."

The general jurisdiction in the Supreme Court, secured to it by article 6, § 1, of the Constitution, is not affected by the legislation regulating practice in the Surrogate's Court. The only effect of these statutes upon the right to maintain an action in a court of general jurisdiction upon a claim against a decedent's estate is to prescribe a short statute of limitations in case a claim is presented and rejected, or in the case an objection to the allowance of a claim by the representative is sustained by the surrogate. Sections 210 and 211, Sur. Ct. Act. In the last analysis the jurisdiction conferred on the surrogate by subdivision 4, § 40, Sur. Ct. Act, is exercised only by consent of the claimant. In case a claim is made and rejected or is allowed by the representative, and an objection thereto sustained by the surrogate, the jurisdiction of the Surrogate's Court to determine the claim upon the judicial settlement of the accounts of the executor or administrator depends on the forbearance of the claimant to bring an action within the time limited therefor by section 211. This forbearance is equivalent to a consent that the claim be adjudicated by the Surrogate's Court. *Michaels v. Flack*, 197 App. Div. 478, 189 N. Y. Supp. 908.

The submission of claims to an executor or administrator is one of the means provided by law for adjusting them, but it is not exclusive, and a claimant may still sue without such submission. *De Planter v. De Kryger*, 190 N. Y. Supp. 861.

Page 1262.

Jury trial of rejected claim.

Where a creditor has brought an action in another court,

he has thereby waived his right (if he has one), to a trial with jury in Surrogate's Court.

Whether a creditor has a right to trial with jury on an accounting in Surrogate's Court is a question which does not seem to be definitely settled. *Matter of Harkness*, 119 Misc. Rep. 361, 196 N. Y. Supp. 287. But see decision of Surrogate Cohalan at ¶ 383 Supplement.

Addition to subject of trial of claim on judicial settlement.

Withdrawing claim.

If the trial of a claim has begun before the surrogate on judicial settlement, it may be withdrawn by permission of the court. Surrogate Schulz has said:

"A claimant is somewhat in the position of a plaintiff in an action, and a withdrawal of a claim is, in effect, discontinuance; hence it may be urged that applications for leave to withdraw are governed by the same rules that apply upon applications for leave to discontinue. The authorities hold that the latter are addressed to the legal discretion of the court, and should not be arbitrarily denied. *Matter of Butler*, 101 N. Y. 307; *Rosen v. Union Ave. Corporation*, 112 Misc. Rep. 492, 182 N. Y. Supp. 811, 190 Supp. 567. They may, however, be refused whenever circumstances exist which afford a basis for the exercise of a legal discretion (*Winans v. Winans*, 124 N. Y. 140), such, for instance, as the intervention of substantial rights of the other party (*Carleton v. Darcy*, 75 N. Y. 375, 376; *Davidson v. Ream*, 98 Misc. Rep. 72, 162 N. Y. Supp. 174)." *Matter of Jahn*, 121 Misc. Rep. 702, 202 N. Y. Supp. 505.

¶ 227 Page 1275.

New York City taxes payable from personal estate.

Whether the executor should pay from the personal estate taxes in the City of New York has been a question upon which the courts have not agreed. It will be remembered that in the City of New York taxes are a lien on the land and not the personal obligation of the owner. It was, therefore, held in such cases as: *Matter of Hewitt*, 40 Misc. Rep. 322, 81 N. Y. Supp. 1030, and *Louby v. Gill*, 42 Misc. Rep. 334, 86 N. Y. Supp. 718, that because taxes were not the personal obligation of the individual they were not pay-

able from the personal estate. This doctrine and theory was disapproved in *Matter of Gill*, 199 N. Y. 155, where the question arose and the Court of Appeals held that the command of the statute was imperative and executors and administrators must pay out of the personalty all taxes on the property of the deceased.

About the time of the Hewitt and Louby decisions a different view was taken and the taxes allowed in *Matter of Hoffman*, 42 Misc. Rep. 90, 85 N. Y. Supp. 1082.

¶ 228 Page 1279.

Continuation of subject of statute of limitations in case of judgment filed as claim.

The filing of the judgment against deceased as a claim does not extend the statute of limitations and after twenty years from the entry it is presumed to be paid. *Matter of Schultze*, 120 Misc. Rep. 287, 198 N. Y. Supp. 441.

Page 1280.

Continuation of subject of deficiency judgment in foreclosure as a debt.

Mr. Surrogate Bird has written on this subject (*Matter of Perkins*, 122 Misc. Rep. 593, 204 N. Y. Supp. 667), and has set forth the following principles as applicable:

Surrogate's Court has no power to direct sale of decedent's real property to pay a mortgage debt. § 234 Sur. Ct. Act.

Under the provisions of § 250, Real Prop. Law, the heir or devisee must satisfy the mortgage, and recourse can not be had to the personal estate.

This rule, however, has no application in case the mortgage is foreclosed.

In the event of a sale in a foreclosure action, if the premises do not sell for enough to pay the mortgage debt and the

expenses of the sale, a deficiency judgment may be entered against the representative if he has been made a party. The only effect of this judgment is to establish the amount and validity of the debt. No execution can be issued thereon without express permission of the Surrogate's Court, and this judgment gives the judgment creditor no advantage over any other creditor. Civil Practice Act, § 656.

If the personal estate has been distributed the heir or devisee is liable to pay or contribute to its payment his pro rata share. Dec. Est. Law, § 176.

Until such deficiency judgment is established, it is at most a contingent liability, and resort must be first had to the lands covered by the mortgage. The claim for the unpaid amount of the bond and mortgage is not a claim which the administrator may allow and pay and be credited for on the judicial settlement of his accounts. *Johnson v. Corbett*, 11 Paige, 265, 269. It is, however, a contingent claim which the representative should provide for, and hence is one that may be presented under the notice to present claims.

Sections 244 and 269, Sur. Ct. Act, are not applicable to such a claim, but the amendment made in 1921 to section 207, Sur. Ct. Act (§ 212, Supp.), concerning contingent claims, and requiring the retention of sufficient funds on judicial settlement to liquidate such a claim, outlines the course to be followed. When foreclosure is completed it is possible that the contingent claim will be fixed.

¶ 229 Page 1282.

Continuation of subject of alimony as a debt against an estate.

The alimony granted to an innocent wife is for her support during the life of her husband, and does not survive him as an obligation against his estate. *Wilson v. Hinman*, 182 N. Y. 408.

But alimony due and unpaid at the husband's death constitutes a valid claim against his estate. *Matter of Bell*, 121 Misc. Rep. 795, 200 N. Y. Supp. 776.

¶ 231 *Page* 1287.**Amendment to sec. 216 Sur. Ct. Act, relating to compelling payment of funeral expenses, by omitting definition.****§ 216. Proceeding to compel payment of funeral expenses.**

Every executor or administrator shall pay, out of the first moneys received, the reasonable funeral expenses of decedent, and the same shall be preferred to all debts and claims against the deceased. If the same be not paid within sixty days after the grant of letters testamentary or of administration, the person having a claim for such funeral expenses may present to the surrogate's court a petition praying that the executor or administrator may be cited to show cause why he should not be required to make such payment. If upon the return of the citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, and that the executor or administrator admits the validity of the claim or claims and the reasonableness of the amount thereof, the surrogate shall make an order directing the payment of the same, or of such part thereof as he may specify, within ten days thereafter. If the executor or administrator files an answer setting forth the facts, and therein disputes the validity of the claim or claims, or the reasonableness of the amounts thereof, the surrogate shall direct that the claim or claims so disputed be heard upon the judicial settlement of the accounts of such executor or administrator. If it shall appear that no money has come into the hands of the executor or administrator the proceeding shall be dismissed without costs and without prejudice to a further application or applications showing that since such dismissal the executor or administrator has received money belonging to the estate. At any time after three months from the date of the former order, if no answer was filed disputing such claim, a further application may be made by petition stating the facts upon which the belief of the petitioner that there are moneys in the hands of such executor or administrator applicable to the payment of his claim, is based. Upon such further application the issuance of the citation shall be in the discretion of the surrogate. If upon any accounting it shall appear that an executor or administrator has failed to pay a claim for funeral expenses, the amount of which has been fixed and determined by the surrogate, as above set forth, or upon such accounting, he shall not be allowed for the payment of any debt or claim against the decedent until said claim has been discharged in full; but such claim shall not be paid before expenses of administration are paid. (Amended by Laws 1923, ch. 129. In effect Sept. 1, 1923.)

The definition of funeral expenses which included perpetual care for a burial lot, a head stone and church or other services which was omitted when this section was re-

enacted was inserted in § 314, Sur. Ct. Act, which will be found under ¶ 476 Supplement.

¶ 236 Page 1306.

Continuation of subject of contracts to dispose of estates.

Prior execution of mutual wills may constitute a contract.

Under section 40, Sur. Ct. Act, as amended the Surrogate's Court upon an accounting has jurisdiction to determine whether mutual wills were executed and constituted a contract for the distribution of property.

The later will, which destroyed the mutuality, must have been admitted, and such question has no place in the probate proceeding. *Matter of Hawes*, 119 Misc. Rep. 359, 196 N. Y. Supp. 255, *affd.* 207 N. Y. Supp. 850.

Page 1308.

Continuation of subject of declarations by testator.

The dispositions contained in another will have been held to be competent as declarations of a testator. See ¶ 56, p. 307.

¶ 239 Page 1317.

Amendment to sec. 217 Sur. Ct. Act, including expenses of administration with debts for which proceeding for payment may be brought.

§ 217. Proceeding to compel payment of debt, *administration expense*, legacy or distributive share, or delivery of property.

Where the executor or administrator has not begun the publication of the notice to creditors to present their claims, and three months have elapsed since the probate of the will or grant of letters of administration, or where such a publication has been completed, any creditor of the deceased having a claim, which has not been rejected, or any person entitled to a specific bequest, or to a legacy or other pecuniary provision under a will, or to a distributive share of an estate, *or any person having a claim for an administration expense*, may present to the surrogate's court a petition setting forth the

facts and praying that the executor or administrator be cited to show cause why he should not pay said claim or pay or satisfy such bequest, legacy or distributive share.

Upon the return of such citation the executor or administrator may reject such claim, or show good and sufficient cause why he should not pay such claim, or pay or satisfy such bequest, legacy or distributive share in whole or in part.

The surrogate may dismiss such petition, or direct immediate payment or satisfaction thereof in whole or in part, or upon receiving a bond as provided in section two hundred and eighteen of this act. (Amended by Laws 1922, ch. 203, § 1. In effect Sept. 1, 1922.)

¶ 241 Page 1324.

Continuation of subject of rights, powers and duties of administrators with the will annexed.

The last part of the section which was added in the revision of 1914 has been discussed in *Hollenbach v. Born*, affd. 238 N. Y. 34, 206 App. Div. 533, 202 N. Y. Supp. 170, where it was held that the right of an administrator with the will annexed to exercise a discretionary power of sale was retroactive to the extent at least of giving that power where the estate was in process of settlement in 1914 when the new provision was inserted.

Page 1325.

Continuation of subject of right of administrator C. T. A. to execute power of sale.

Right of Administrator C. T. A. to execute power of sale.

Surrogate's Court Act, § 225, formerly Code Civ. Proc. § 2695, as revised by Laws 1914, ch. 443, providing that power to sell realty given by will to an executor may be executed by an administrator with will annexed unless contrary to will, is applicable to administrators with will annexed appointed after its enactment, although will took effect before, and hence an administrator with will annexed, appointed for an estate in process of administration when

statute was enacted, could exercise power of sale which was merely discretionary. *Hollenbach v. Born*, 238 N. Y. 34, affg. 206 App. Div. 533, 202 N. Y. Supp. 170.

¶ 243 Page 1333.

Amendment to sec. 130 Surrogate's Court Act, relating to power of temporary administrators to lease real property.

§ 130. Power as to real property.

When a temporary administrator is appointed and a proceeding is pending for the probate of a will of real property, or there is a delay in the granting of letters testamentary or administration on such a will or in the qualification of a trustee named therein, the surrogate may, by the order appointing him, or by a subsequent order, confer upon him authority to take possession of real property in the same or another county, which is affected by the will, and to receive the rents and profits thereof or to do any other act with respect thereto, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or defend any action or special proceeding. *The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year.* The surrogate may, by an order, confer upon him authority to mortgage or sell any or all of the real property, for the purposes specified in article thirteen of this act under such circumstances and restrictions, in such manner, and upon such terms and conditions as are specified in said article. (Amended by Laws 1923, ch. 272, § 1. In effect Sept. 1, 1923.)

There is now definite provision for an order permitting lease for one year, and the permission to lease for payment of debts seems to be omitted, as the word "lease" is not now in the last sentence which heretofore authorized a lease to raise money for the payment of debts. This amendment will be unfortunate if it is construed that a temporary administrator can not have the benefits of § 232 (¶ 245), Sur. Ct. Act as to leasing property to pay debts.

¶ 245 Page 1340.

By an amendment to section 130 Sur. Ct. Act (¶ 243), the provision that a temporary administrator might lease real property to pay debts under title 13 of that Act has

been omitted. If it shall be construed that the section as amended prevents a temporary administrator from acting under this section, what is said in ¶ 244 *et seq.* about leasing by such administrator must be ignored.

Page 1346.

Continuation of subject "Tenancy by entirety."

Where real estate held as tenants by entirety is sold and a mortgage given back to husband and wife, the mortgage is owned by them as tenants in common and does not belong to the survivor. *Matter of Blumenthal*, 236 N. Y. 448.

Page 1352.

Amendment to sec. 234 Sur. Ct. Act, relating to sale for payment of debts by striking therefrom definition of funeral expenses.

§ 234. For what purpose real property is subject to disposition.

2. For the payment of his funeral expenses. (Amended by Laws 1922, ch. 139, § 2. In effect Sept. 1, 1922.)

The remainder of the subdivision has been reenacted and inserted in section 314. (¶ 476 Supplement.)

¶ 248 *Page 1354.*

Amendment to sec. 236 Sur. Ct. Act, providing for making state a party to proceedings to mortgage, lease or sell real property.

§ 236. When and how real property may be mortgaged, leased or sold.

At any time after his appointment and qualification an executor or administrator may apply for an order to mortgage, lease or sell the real property of the decedent for any of the purposes specified in section two hundred and thirty-four of this act by presenting a verified petition setting forth facts showing that the personal property left by the deceased is insufficient for the payment of the just demands and charges against the same, which petition shall contain a schedule of the funeral expenses and claims presented to and allowed by him, and upon presentation thereof a citation shall issue to, and be served upon all persons interested in the real estate of such decedent, or

in any question raised with reference to the mortgage, lease or sale thereof; and upon a judicial settlement of the accounts of an executor or administrator, any party to the proceeding may allege and show by proof such facts and circumstances as are required to give the court jurisdiction to order the mortgage, lease or sale of the real property left by the deceased for any of the reasons specified in section two hundred and thirty-four. The petition presented by the executor or administrator as above provided, or the petition and account filed in the proceeding for judicial settlement shall be sufficient proof of the facts therein stated unless an issue is raised as to any of such statements. If any person interested in such real estate, or in any question raised with reference to the mortgage, lease or sale thereof, is not a party to such judicial settlement, the surrogate, before proceeding further shall cause such person to be brought in by supplemental citation. *The people of the state of New York may be made a party to either of the proceedings described in this section in the same manner as a private person where it appears that there is no heir-at-law or that it is not known whether or not there be such, or where the property may have escheated by reason of the incapacity of an alien to take. The petition in such case shall set forth detailed facts showing the particular nature of the interest of the people of the state and the particular reason or reasons for making the people of the state of New York a party to the proceedings; upon failure to state such facts, the proceeding shall be dismissed as to the people of the state. In such a case a citation shall issue to and be served upon the attorney-general who must appear in behalf of the people.*

2. In all cases where, prior to the date when this act shall take effect, the attorney-general shall have appeared in behalf of the people of the state or New York in a proceeding for the mortgage, lease or sale of the real estate of a decedent, such appearance shall be as valid and effectual as though this act had been in force at the time of such appearance, whether or not such proceeding is still pending or has been concluded on the date when this act shall take effect; provided, however, that nothing herein contained shall affect the right or title of any person claiming such real property under letters patent issued by the people of the state of New York for a valuable consideration before this act shall take effect. (Amended by Laws 1923, ch. 520. In effect Sept. 1, 1923.)

Page 1356.

Continuation of subject of when application for mortgage, lease or sale of real estate may be made.

The sale may be had on judicial settlement whenever that may be had, even though the letters were issued to the representative before the act of 1920, chap. 479. *Matter of Collins*, 122 Misc. Rep. 265, 203 N. Y. Supp. 495.

Continuance of subject of sale of real estate to pay debts—Petition.

An allegation that the personal estate is not sufficient to pay the expenses of administration, funeral expenses and debts is a conclusion and does not give the court jurisdiction to entertain the proceedings. The facts as to the amount of personal estate, debts and charges should be set forth. *Matter of Perkins*, 122 Misc. Rep. 593, 204 N. Y. Supp. 667; *Personeni v. Goodale*, 199 N. Y. 323.

Addition to subject of limitation of time to commence proceeding in which sale can be had.

Where an involuntary proceeding for an accounting is begun within the 18 months and such proceeding is consolidated with a voluntary proceeding, the original proceeding gives jurisdiction within the time limit to make an order for sale. *Matter of O'Donnell*, 121 Misc. Rep. 496, 201 N. Y. Supp. 463.

Consult this same case in 208 App. Div. 374 and 203 N. Y. Supp. 882, where the case was reversed upon some of the facts, but the above ruling was maintained.

¶ 249 Page 1358.

Addition to subject of defense in application to mortgage, lease or sell real estate.

Defense of partition, action pending.

Under Civil Practice Act, § 1048, the decree of the surrogate granting an application for the sale of real estate to pay debts subjects the proceeds of a sale of decedent's real property, whether sold under the direction of that court or in a pending action for partition, to the payment of decedent's debts, and the application will not be denied because of the pendency of such action. *Matter Collins*,

122 Misc. Rep. 265, 203 N. Y. Supp. 495. Consult Fiero on Particular Actions and Proceedings.

¶ 252 Page 1369.

Continuation of subject of disposition of proceeds when property sold by another court.

Sale for admeasurement of dower.

Where a sale is had in an action to admeasure dower, the fund must be distributed by the supreme court, but a decree, order or certificate must first be obtained upon an application under sec. 236 S. C. A. *Farrell v. Farrell*, 206 App. Div. 355, 201 N. Y. Supp. 238.

Page 1371.

Continuation of subject of "Payment of proceeds of sale into court."

Correction.

Change § 1044 Civ. Pr. A. to § 1045.

In certain cases the proceeds of sale may be paid directly to the heirs under Sec. 1048, Civ. Pr. Act, which follows:

§ 1048. When proceeds payable directly to parties.

Where final judgment shall be rendered in any action for partition after eighteen months have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of the decedent from whom the plaintiff derived title, and the premises shall have been sold free from the lien of debts, then, upon producing to the court the certificate of the surrogate of the county in which the decedent was at the time of his death a resident, showing that eighteen months have elapsed since the issuing of letters of administration or letters testamentary, as the case may be, upon the estate of such decedent, and that no proceeding for the mortgage, lease or sale of the real property of the decedent for the payment of his debts or funeral expenses, or both, is pending, and upon the certificate of the clerk of the county where the real property sold under the interlocutory judgment is located showing that no notice of pendency of action in respect to such real property has been filed in his office, the court rendering the final judgment shall direct the payment of the different shares to the several parties entitled thereto; except that the share of

a deceased person, who, if living, should be a party to the action, shall be paid into court, unless eighteen months have also elapsed since the granting of letters of administration or letters testamentary, as the case may be, upon the estate of said last mentioned deceased person, and like certificates of the surrogate and county clerk are produced to the court.

¶ 254 Page 1380.

Addition to subject of sale for distribution.

Sections 236 and 242, Sur. Ct. Act, indicate that the Legislature intended to give discretion to the court to sell real property for distribution at any time when there was an infant, incompetent, absentee or unknown owner, and withhold the distribution of the assets until judicial settlement. *Matter of D'Andrea*, 118 Misc. Rep. 541, 193 N. Y. Supp. 764.

An administrator making application on his judicial settlement for an order to sell real estate in which an infant is interested, may be directed to make such sale. *Matter of Fogarty*, 120 Misc. Rep. 507, 199 N. Y. Supp. 799.

¶ 265 Page 1408.

Addition to subject as to when specific devise or bequest carries other property.

A will gave real estate "together with all the contents of said house" and in the attic was found an evidence of indebtedness of the legatee to the testator, *held* that the paper was not bequeathed under the language. *Central U. T. Co. v. Flint*, 198 App. Div. 703, 191 N. Y. Supp. 46.

It appears that "contents" may be given a broader meaning when used in a residuary clause to prevent intestacy. *Matter of Reynolds*, 124 N. Y. 388; *Ball v. Dixon*, 83 Hun, 344, 31 N. Y. Supp. 990; *Fenton v. Fenton*, 35 Misc. Rep. 479, 71 N. Y. Supp. 1083; *Matter of Downey*, 133 App. Div. 409, 117 N. Y. Supp. 838; *Matter of Thompson*, 217 N. Y. 111, 116. See also Words and Phrases construed ¶ 477.

¶ 267 *Page 1411.***Continuation of subject of ademption of legacies.****Change in form.**

Ademption is the extinction or satisfaction of a legacy by some act or the testator which is equivalent to a revocation of the bequest or indicates the intention to revoke. *Burnham v. Comfort*, 108 N. Y. 535, 539. Slight or immaterial changes in the form of personalty specifically bequeathed will not work an ademption. *Matter of Howard's Estate*, 46 Misc. Rep. 204, 205, 94 N. Y. Supp. 86; *Matter of Leavitt's Estate*, 86 Misc. Rep. 609, 148 N. Y. Supp. 758; *Matter of Adams Estate*, 90 Misc. Rep. 254, 152 N. Y. Supp. 727; *Pruyn v. Sears*, 96 Misc. Rep. 200, 161 N. Y. Supp. 58. The transformation of state to national bank stock is not such a change as will cause a legacy of the former to fail (*Maynard v. Mechanics' National Bank of Philadelphia*, 1 Brewst. [Pa.] 483), and, the transformation of stock of one national banking corporation to the stock of another national banking corporation organized to succeed the former does not work an ademption. *Matter of Bradley*, 119 Misc. Rep. 2, 194 N. Y. Supp. 888.

Must be occasioned by act of testator.

Provision for securing 50 shares of stock and giving such shares to a legatee as a wedding present as testator had done to others, was held to be an ademption where testator in his life time had made such present. *Matter of O'Dell*, 124 Misc. Rep. 76, 207 N. Y. Supp. 261.

¶ 268 *Page 1413.***Legacy for support—abatement.**

“Where an estate is not sufficient to pay in full all the general legacies bequeathed by will, in the absence of an expressed indication that the testator intended otherwise legacies abate *pro rata*. One of the few exceptions to this

general rule, however, is that where the legacy is given for the support, maintenance or education of a near relative otherwise unprovided for it will be preferred. *Stewart v. Chambers*, 2 Sandf. Ch. 382; *Petrie v. Petrie*, 7 Lans. 90; *Bliven v. Seymour*, 88 N. Y. 469; *Matter of Wenner*, 125 App. Div. 358, 110 N. Y. Supp. 694, affd. 193 N. Y. 672. Such we say must have been the intention of the testator. He naturally expects that all legacies will be paid in full. If this becomes impossible he would desire that wife, children, or other near dependents should obtain the support and means of education necessary for their future, and which he supposed he had secured to them, before mere gifts to others are paid. 'Otherwise provided for,' therefore, must mean more than a nominal provision or one the testator would regard as plainly insufficient." *Matter of Neil*, 238 N. Y. 138, rev. 205 App. Div. 605, 200 Supp. 160, affg. 117 Misc. Rep. 498, 191 Supp. 362.

Page 1414.

Continuation of subject "Abatement of legacies in trust for support."

There is no positive rule for determining whether a particular legacy is to be paid in full or whether it is to abate. Each case depends upon a consideration of all of the material provisions of the will and of the extrinsic circumstances which bear upon the question of intent (*Pierrepoint v. Edwards*, 25 N. Y. 128), and even legacies for support and maintenance are not free from abatement, unless the legatees are otherwise unprovided for. *Matter of Schaaf*, 120 Misc. Rep. 292, 199 N. Y. Supp. 284.

¶ 270 Page 1418.

Continuation of subject of bequest considered as a secret trust.

A bequest "for his services and agreements made between us" are explanatory and do not imply a secret trust or agreement so as to incorporate into the will matter contained in other papers. *Matter of Taylor*, 123 Misc. Rep. 856, 207 N. Y. Supp. 79.

¶ 273 Page 1423.

Continuation of subject of devises and bequests for charitable purposes.

The beneficiaries of a bequest for charitable purposes need not be residents of the state of New York, or the charities be specifically designated, provided a charitable purpose is expressed and the devise or bequest limited to lawful uses. A gift to be expended for the Irish Republic is not charitable. *Matter of Killen*, 124 Misc. Rep. 720, 209 N. Y. Supp. 206.

¶ 274 Page 1426.

Continuation of subject of charitable bequests.**A gift to a charitable purpose, made to take effect after a prior gift to an individual or corporation.**

A gift for a charitable purpose, made to take effect after a gift to an individual on a condition not necessarily to be fulfilled within the period prescribed by the rule against perpetuities, is not taken out of the rule by the law of charitable uses, and is therefore void.

A gift to one charity, with a gift over to another charity on the happening of a remote contingency, is saved from the prohibition of the rule against perpetuities by the law of charitable uses.

An executory gift to a charity, not preceded by a gift to an individual, though a period greater than prescribed by the rule against perpetuities may lapse before the donee is empowered to receive the gift, is valid. *Matter of Potts*, 205 App. Div. 147, 199 N.Y. Supp. 880, aff. 236 N. Y. 658.

Widow who was given power of appointment, exercised such power by directing her executors to convey to a charitable corporation "to be formed as soon as practicable after my decease." Administrative delays are held not to be within the contemplation of the statute of perpetuities.

(§ 11, Pers. Prop. Law, page 1611.) *Matter of Le Fevre*, 233 N. Y. 138; *Maynard v. Farmers L. & T. Co.*, 119 Misc. Rep. 503, 197 N. Y. Supp. 526, affd. 208 App. Div. 112, affd. 238 N. Y. 592.

Page 1427.

Amendment to section 17 Decedent Estate Law, relating to devise or bequests of more than one-half of an estate in certain cases.

§ 17. Devise or bequest to certain societies, associations, corporations or purposes.

No person having a husband, wife, child or parent, shall, by this or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association, corporation *or purpose*, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more. (Amended by Laws 1923, ch. 301, § 1. In effect Sept. 1, 1923.)

This statute was enacted for the protection of persons who would benefit thereby, and they may waive its provisions in their favor. *Matter of De Lamar*, 203 App. Div. 638, 197 N. Y. Supp. 301, affirmed 236 N. Y. 604.

The amendment adding "or purpose" would seem to have been made for the purpose of overcoming the rule of law laid down in the case of *Allen v. Stevens*, 161 N. Y. 122, where it was held that a charitable gift might be made to trustees, and not to a society, association or corporation, and so not come within the prohibition of section 17, Dec. Est. Law, as it existed before the amendment made by ch. 301, Laws 1923. *Matter of Merritt*, 124 Misc. Rep. 709, 209 N. Y. Supp. 243, 249.

Page 1430.

Continuation of subject of increase or decrease of estate or fund only one-half of which goes to a corporation.

The value of the estate is fixed as of the date of the death of the testator on the basis that it is there turned into cash.

If payment is postponed allowance must be made for that fact, and the corporation legatee can receive no more. Out of the remaining half of the estate must be paid expenses and legacies, and that half may be increased by profits and increase of the estate and in some cases by stock dividends. *Matter of Seymour*, 239 N. Y. 259.

Continuation of subject of determining amount of estate where one-half goes to certain corporations.

In *Matter of Suydam*, 122 Misc. Rep. 340, 203 N. Y. Supp. 911; *Same case*, 190 App. Div. 575, 180 Supp. 293, and in *Matter of Seymour*, 122 Misc. Rep. 343, 203 N. Y. Supp. 914, affd. 209 App. Div. 655, 205 Supp. 327, Mr. Surrogate Wingate has discussed the rules by which it may be determined whether more than one-half of the estate is given and how the amount of that half is determined.

Continuation of subject of computing value of life interest.

Actual duration of life.

The legislature has not authorized the use of the mortality tables in ascertaining the value of one-half of the estate. In some cases it has, for instance in the Tax Law, in computation of dower, and in deposit in court.

But in determining what is the value of the estate and ascertaining one-half thereof, the actual duration of life is the measure of the value of the life estate. *Matter of Seymour*, 239 N. Y. 259; *Frost v. Emanuel*, 152 App. Div. 687, 209 App. Div. 658, 205 N. Y. Supp. 330, 137 N. Y. Supp. 559; *Matter of Teed*, 59 Hun, 63, 12 N. Y. Supp. 642; *Rich v. Tiffany*, 2 App. Div. 25, 37 N. Y. Supp. 330.

The former case of *Hollis v. Drew*, 95 N. Y. 166, is now distinguished, and *Matter of Strang*, 121 App. Div. 112, 105 N. Y. Supp. 566, does not seem to be followed.

Page 1431.

General legacies to be paid in full.

The fact that by reason of the statute the residuary legatees do not get the full amount, is no reason for reducing the amounts passing under general legacies of specific amounts.

Matter of Ham, 206 N. Y. Supp. 506.

Matter of Johnston, 76 Misc. Rep. 391, 137 N. Y. Supp. 166.

Matter of Farmers' L. & T. Co., 186 App. Div. 722, 175 N. Y. Supp. 37, mod. 226 N. Y. 691.

Matter of Title G. & T. Co., 195 N. Y. 339.

Remainder may be intestate property.

The remainder of the estate after payment of legacies to individuals and the permitted amount to other legatees, must be distributed as intestate property. *Matter of Ham*, 206 N. Y. Supp. 506.

¶ 275 Page 1435.

Correction. In third paragraph "incorporated" should read *unincorporated*.

¶ 276 Page 1437.

Continuation of subject of legacy eo nomine.

Before a gift to executors and trustees *eo nomine* can be held to vest in them individually, the intention that it shall so vest must be plainly manifest. *Matter of Schaff*, 120 Misc. Rep. 292, 199 N. Y. Supp. 284; *Christman v. Roesch*, 132 App. Div. 22, 116 N. Y. Supp. 348, *affd.* 198 N. Y. 538; *Forster v. Winfield*, 142 N. Y. 327.

Page 1438.

Continuation of subject of bequest to those persons who are next of kin.

A gift after a life estate and the death of a daughter, "to such persons as would be entitled to the same as my heirs

under the intestate laws," held to be a gift to the heirs of the daughter who predeceased her mother. *Matter of Bump*, 234 N. Y. 60. Followed 237 N. Y. 102.

Under a remainder given in a will to "my nearest kin" it was held that a brother and sister took to the exclusion of nephews and nieces, and that those words should not be construed as meaning "heirs at law." *Haas v. Speenburgh*, 122 Misc. Rep. 458, 203 N. Y. Supp. 202, affd. 207 N. Y. Supp. 847.

At what date the class ascertained.

The general rule of testamentary construction is that in the absence of a clear direction to the contrary, the class described by the testator as heirs and next of kin, to whom a remainder interest is given by the will, is to be ascertained as of the time of his death. This construction is not changed by the fact that a life estate may precede the bequest to the heirs at law or next of kin, nor by the circumstance that the bequest to such heirs or next of kin is contingent on an event that may or may not happen. There must be a clear intention manifested by the will to make a different disposition of the property where the bequest is to heirs at law and next of kin to take it out of the rule that heirs at law and next of kin so described will be determined as referring to those who are such at the time of testator's death. The reason for the rule is said to be that the words cannot be used properly to designate anybody other than those who answer to the description at the time of testator's death. It is said that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes upon the previous limitations and is content thereafter to let the law take its course. The rule has been held to be applicable to an executory devise or a contingent remainder. *Matter of White*, 209 N. Y. S. 433.

¶ 277 Page 1439.

Continuation of subject of distribution under a power.

Section 158, Real Prop. Law, contemplates the creation of a power under the terms of which the grantee may distribute property to persons in the manner or proportions as he thinks proper. *Matter of Lawler*, 123 Misc. Rep. 172, 205 N. Y. Supp. 271; *Morgan v. Sanborn*, 225 N. Y. 454; *McLean v. McLean*, 174 App. Div. 153, 160 N. Y. Supp. 949.

¶ 278 Page 1442.

Continuation of subject of absolute gift cut down by subsequent provision.

“Where there is an absolute gift of real or personal property, in order to qualify it or cut it down, the latter part of the will should show equally clear intention to do so by use of words definite in their meaning and by expressions which must be regarded as *imperative*.” *Tillman v. Ogren*, 227 N. Y. 495, at page 505.

In *Weber v. Kress*, 198 App. Div. 687, 192 N. Y. Supp. 186, the court said:

“When an estate is given in one part of a will in terms which are clear and positive, such estate cannot be cut down by a subsequent clause of the will where the words are less clear than the words of the prior clause giving the estate.”

See also 208 App. Div. 653, 204 Supp. 50.

In the *Matter of Ithaca Trust Co.*, 220 N. Y. 437, at page 441, the court said:

“Where a gift is provided by will and such gift is intended to be absolute, a gift over is repugnant to such absolute gift and void, and the purported gift over must be treated as a mere expression of a wish or desire regarding the distribution of such part of the gift as may remain undisposed of at the death of the donee.”

Followed 227 N. Y. 504.

Page 1443.

Effect of the words "to have and to hold."

In determining whether a devise is absolute or for life, the words "to have and to hold" if standing alone, taken in connection with words "during life" would qualify the estate devised to a life estate. *Bilger v. Nunan*, 186 Fed. 665, 668, affirmed 199 Fed. 549.

"The term 'heirs' or other words of inheritance are not requisite to create or convey an estate in fee." Real Prop. L., § 240.

Page 1444.

Continuation of subject of condition subsequent.

A gift to a daughter provided she procures the annulment of an adoption by which she has adopted a child is contrary to public policy and therefore the condition is void, and as such condition is a condition subsequent, the gift becomes absolute. *Matter of Anonymous*, 80 Misc. Rep. 10, 141 N. Y. Supp. 700; *Matter of Kathan*, 141 N. Y. Supp. 705.

¶ 279 Page 1446.

Continuation of subject of power of appointment by will.

Where power is given to appoint one person of a class, a nephew, if the same be not exercised the estate does not go to all the nephews, but if there is a residuary clause, it will pass under that. *Waterman v. N. Y. Life Ins. & T. Co.*, 237 N. Y. 293.

Page 1447.

Addition to general subject of validity and exercise of power of appointment.

Will of the donee of a power must be probated.

The instrument purporting to exercise the power of ap-

pointment must first be admitted to probate before it becomes effective. The sufficiency of the instrument as a will must be tested by our laws of wills. If the will under which the donee acts is that of a nonresident where no question is raised by any party as to the legality of the rejection or admission of the donee's will to probate, our courts, as a matter of comity or discretion, may accept the decree of the foreign state, if the requirements of our state are established. But where the rights of infants are prejudiced, or where substantial objections are raised to the regularity of the procedure in the foreign state, our courts must enforce their exclusive jurisdiction over the donor's estate, and inquire into the validity of the donee's will in an original proceeding here. Only by such safeguards may the beneficiaries be protected against a collusive or fraudulent proceeding in a foreign state by which the intentions of a New York testator, or of his appointor, may be wholly frustrated. *Matter of Harriman*, 124 Misc. Rep. 320, 208 N. Y. Supp. 672.

¶ 280 Page 1447.

Continuation of subject of interest of life tenant.

Death of life tenant.

The death of a life tenant of real estate extinguishes an unexpired term for years granted by him.

Under Real Property Law, § 530, as added by Laws 1920, c. 930, §1, and Code Civ. Proc. § 1664, lessee from life tenant becomes trespasser, on continuing in possession after death of his lessor without express consent of person immediately entitled. *Matter of O'Donnell*, 240 N. Y. 99.

¶ 281 Page 1452.

Amendment to sec. 48, Dec. Est. Law, making sec. 314 Sur. Ct. Act (the section of definitions) applicable to sections 23 to 25 and 42 to 47, both inclusive, Dec. Est. Law.

§ 48. Application of certain sections of this article.

Section three hundred and fourteen of the surrogate's court act is applicable to the provisions of sections twenty-three to twenty-five, both inclusive, and sections forty-two to forty-seven, both inclusive, of this chapter. (Amended by Laws 1924, ch. 164. In effect immediately.)

¶ 284 Page 1459.

Continuation of discussion of § 29, Dec. Est. Law.

A testator may take the disposition of void or lapsed legacies out of the hands of the law, and make his own disposition thereof. He may make a bequest of such part of his estate, if any, to another person than the original legatee. *Matter of O'Reiely*, 121 Misc. Rep. 100, 201 N. Y. Supp. 63.

Page 1460.

Continuation of subject of substitutionary devise or bequest. "Or his heirs" construed.

It seems that in construing a bequest of personal property, the courts are more inclined to give to "or his heirs" a substitutionary meaning, than where the devise is of real estate. Where the intent of the testator can be argued out, it will be held that those words carry the bequest on to the next of kin of the deceased legatee, and the legacy does not lapse. It has been only a refinement of language that has prevented that sensible construction for many years. *Matter of Evans*, 234 N. Y. 42, reversing 199 App. Div. 952, 191 N. Y. Supp. 924. See also 233 N. Y. 529.

The words "heirs," "lawful heirs," "heirs and assigns," and other like words, do not create a substitu-

tionary gift. *In re Reynolds*, 109 Misc. Rep. 453, 178 N. Y. Supp. 821; *Matter of Tamargo*, 220 N. Y. 225, affirmed 192 App. Div. 937, 181 N. Y. Supp. 951. Followed 230 N. Y. 520. See also Words and Phrases construed ¶ 474.

Lapse of a bequest in case the legatee is not in the employ of testator.

Such a legacy lapses if the person named is not in the employ of the testator at his death, but if it is given to a remainderman it goes at once to such remainderman. *Metz v. O'Dell*, 124 Misc. Rep. 76, 207 N. Y. Supp. 261.

Page 1462.

Corporation merged with another, or dissolved before death of testator.

A legacy to a charitable corporation which has been merged or consolidated with another before the death of testator does not lapse, but may be paid to the successor corporation. *Matter of Doane*, 208 N. Y. Supp. 320; *Matter of Bergdorf*, 206 N. Y. 309.

But in a case where the corporation legatee before the death of testator transferred its property, surrendered its charter and ceased to exist, the legacy was held to have lapsed. *Wright v. Wright*, 225 N. Y. 329.

Membership Corporations Law, Section 7.

Under Membership Corporations Law, section 7, before the amendment of 1924, it was provided that where membership corporations had consolidated the consolidated corporation was vested with the property belonging to the corporations so consolidating.

By chapter 327, Laws of 1924, in effect April 24, 1924, provision was made for the rights of corporations "merging" and a new sub-division was added which in terms

provided that upon the consolidation or merger of two corporations all gifts and devises vested, contingent or in expectancy of either corporation should enure to the benefit of the new corporation.

¶ 286 Page 1466.

Continuation of subject "When legacies and devises vest."

An estate is vested when there is an immediate right of present enjoyment, or a present right of future enjoyment. Though it may be uncertain whether a remainder will ever take effect in possession, it will nevertheless be a vested remainder if the interest is fixed. There are estates vested in possession and estates vested in interest, and there are vested estates which may be divested. *Matter of Trevor*, 120 Misc. Rep. 22, 197 N. Y. Supp. 719.

This decision was reversed in the appellate division by a divided court, it being there held that the trust after the life of the widow was invalid. *Trevor v. Trevor*, 207 App. Div. 673, 202 N. Y. Supp. 862, mod. 239 N. Y. 6.

Page 1468.

Continuation of subject of vesting.

Devise to widow to hold in trust and use for the support of herself and minor children, and then to be divided equally among the children—*held* that the devise did not vest in the children before the death of the widow so that they could maintain partition. *Cleere v. Riley*, 123 Misc. Rep. 9, 204 N. Y. Supp. 44, *affd.* 205 Supp. 917, 210 App. Div. 813. (See Fiero on Particular Actions and Proceedings.)

¶ 287 Page 1469.

Continuation of subject of vesting if death occurs before time designated for payment.

Under a will providing that, if any legatee shall have

died before he shall have been entitled to receive the legacy according to the terms of the will, the legacy shall lapse and form part of the residuum of the estate, and that until one year shall have elapsed after testator's death no legacy shall be paid to any legatee, *held*, that legacies to legatees who died within a year after testator's death went to residuary legatees. *Matter of Merrill*, 208 App. Div. 649, 204 N. Y. Supp. 47, *affd.* 239 N. Y. 15. (Martin and Finch, JJ., dissenting.)

In *Bushnell v. Carpenter*, 92 N. Y. 270, the court held:

The mere postponement of the time of payment does not make a legacy contingent. Thus, where one or two grandchildren, to each of whom a sum was bequeathed, payable when they were 25 years of age, died prior to that time, it was held that the legacy vested upon the death of the testator; that the various provisions showed that payment was postponed for the convenience of the estate; and that the administrator of the estate of the deceased grandchild was entitled to recover her legacy in an action brought after she would have been 25 years old, had she lived.

In *Loder v. Hatfield et al.*, 71 N. Y. 92, the court held:

Where a gift of a legacy is direct and absolute, a subsequent and independent direction for payment on the happening of an event named does not defer the vesting of the legacy, but only postpones the payment, and if the legatee die before the happening of the event, his representatives are entitled to the legacy. So, also, where a direction for the payment of a legacy at a future day is for the convenience of the estate, or to let in some other interest, the vesting of the gift is not prevented.

In *Tillman v. Ogren*, 99 Misc. Rep. 539, the court at page 502 said:

"The gift over after a gift that is apparently absolute is sustained, because it is ascertained that it was not the giver's intention to make an absolute gift, but one qualified and limited by the subsequent or other provisions of the will or instrument creating the gifts. *Leggett v. Firth*, 132 N. Y. 7. The common-law rule governing repugnant gifts has been changed by statute. Real Property Law (Cons. Laws, c. 50) § 57; Personal Property Law (Cons. Laws, ch. 41) § 11."

¶ 289 Page 1475.

Continuation of subject of annuities, and taxes thereon.

The income from an annuity is subject to the transfer tax upon the sum fixed as the value of the annuitant's interest, and the tax on the remainder interest should be paid by the remainderman. The income is also liable to be charged with commissions. The tax should be deducted from the fund in the first instance. The annual amortization of the tax should be deducted from the income which is obtained by dividing the tax on the annuitant's interest by the number of years of the life expectancy.

Matter of Tracy, 179 N. Y. 501.

Matter U. S. Trust Co., 86 Misc. Rep. 603, 148 N. Y. S. 762.

Matter Maresi, 74 App. Div. 76, 77 N. Y. S. 76.

Matter Fleischer, 209 N. Y. S. 684.

¶ 290 Page 1482.

Addition to subject of legacy in foreign money.

Where a will was made in 1914, bequeathing German marks, it was held in *Matter of Hess*, 120 Misc. Rep. 372, 198 N. Y. Supp. 573, that it was the intention of the testatrix to give a substantial bequest and that gold or silver currency was intended and not depreciated paper currency in use at the date of the death of the testatrix.

An annuity payable in francs.

The estate was that of a resident and was being administered here, and it was held that an annuity payable in francs to a person for whom the testator desired to provide a support was payable in gold francs and not in paper francs which were greatly depreciated. *Chemical Nat. B. v. Butt*, 123 Misc. Rep. 575, 206 N. Y. Supp. 36.

Page 1483.

Continuation of subject of payment of legacies.

Payment of a legacy at the expiration of the publication of notice to creditors is permitted under this section, but it cannot be compelled until the expiration of a year from the granting of letters. § 146 Dec. Est. L. ¶ 301; *Matter of Brooklyn Trust Co.*, 179 App. Div. 262, 166 N. Y. Supp. 513.

A legacy is not due and payable until one year after issue of letters, but it may be paid after completion of publication of notice to creditors. When so paid before the expiration of one year, no interest is payable, neither can the residuary legatee claim that the executor should have waited until the end of the year so that he might have the benefit of the interest. See ¶ 294. *Matter of Juilliard*, 103 Misc. Rep. 178, 169 N. Y. Supp. 1079.

¶ 293 Page 1488.

Continuation of subject of offsetting debt.

Effect of statute of limitations.

Until recently our courts followed the English rule, and allowed the representative to set off against a legacy or distributive share a debt owing to the deceased by a legatee or distributee even though the statute of limitations had run against it.

That rule has now been changed by recent decisions, and a debt which can not be enforced, can not be so offset. *Matter of Farrell*, 121 Misc. Rep. 536, 201 N. Y. Supp. 365; *Matter of Flint*, 118 Misc. Rep. 354, 193 N. Y. Supp. 313.

¶ 294 Page 1492.

Continuation of subject "Interest on general legacies."

In *Matter of Brooklyn Trust Co.*, 179 App. Div. 262, 166 N. Y. Supp. 513, it was held that there had been no change

by recent amendments in the time when an action could be begun to enforce payment of a general legacy, and that therefore a general legacy was not due until the expiration of a year from the grant of letters and did not draw interest until after such year.

¶ 295 Page 1498.

Addition to general subject of interest on legacies to children.

Legacy payable at a future date.

The general rule is that a legacy payable at a future date does not carry interest until after it is payable, unless it be a legacy to a child payable at a future date and the child has no other provision nor any maintenance in the meantime allotted by the will, and the relation of parent and child, or some similar duty of care and maintenance, exists. This exception is based on the presumption that the parent must have intended that the child should, in the meantime, be maintained at his expense, but this implication is destroyed if any provision, however small, be made for maintenance. And the better opinion or the weight of authority is that even this humane presumption does not apply to the case of grandchildren, and that there must be something special in the will for that purpose in case of a grandchild, or a legacy payable at a future date will not carry interest. *Lupton v. Lupton*, 2 Johns. Ch. 614, 628. This rule has been several times reaffirmed, particularly in *Williamson v. Williamson*, 6 Paige, 298; *Bradner v. Faulkner*, 12 N. Y. 472; *Thorn v. Garner*, 113 N. Y. 198; *Lyon v. Industrial School Association*, 127 N. Y. 402; and *Harward v. Hewlett*, 5 Redf. Sur. 330, and the exception is discussed in *Brown v. Knapp*, 79 N. Y. 136. *Matter of Hier*, 205 App. Div. 215, 199 N. Y. Supp. 623.

¶ 296 Page 1499.

Addition to subject of legacy of income.

Nature of income from savings bank deposits.

The income which is usually called "interest" on deposits in savings banks, is not accrued interest to date of death subject to apportionment, but is income in the nature of dividends and goes to the person or persons entitled to the income of the estate. *Matter of Mercer*, 117 Misc. Rep. 371, 192 N. Y. Supp. 317.

One reason for this rule is that the interest on savings bank deposits is not payable until declared, as a dividend on stock is, and it is declared at the end of a regular fixed term on only the amount on deposit during and until the end of that term.

¶ 300 Page 1511.

Addition to subject of a legacy of a right to occupy a house or room.

Legacy of right to live in house and have the same maintained.

Where a will directs the upkeep of a house and home estate to be paid from the general estate, and gives members of his family the use of such property, a trust fund should be set up for the maintenance. *Matter of Trevor*, 119 Misc. Rep. 277, 196 N. Y. Supp. 152.

In such a case there is an implied trust in the executor, and he has the management and control of the property. *Matter of Security T. Co. of R.*, 232 N. Y. 109.

A devise stating that a certain person may occupy the property at a stated rent, imposes a charge on the property and the devisee must take it, if at all, subject to such condition. *Matter of Conway*, 120 Misc. Rep. 287, 198 N. Y. Supp. 351, *affd.* 204 Supp. 900, 209 App. Div. 807.

¶ 302 *Page 1515.*

Section 217 Sur. Ct. Act, as amended in 1922 may be found at ¶ 239 Supplement.

The amendment consists in authorizing a proceeding to compel payment of an administration expense. Such amendment tends to further weaken the old principle that expenses of administration are obligations of the executor or administrator.

¶ 303 *Page 1521.*

Continuation of subject of application for allowance for support of infant.

Section 221 of the Surrogate's Court Act permits an allowance to be made in the discretion of the surrogate, under certain circumstances, for the support or education of a legatee or distributee. The provisions of that section only allow an advance payment where the person is "in actual need" of money for his support or education, and the surrogate is authorized, in his discretion, to direct payment only where the expenditure "is necessary for the support or education of the petitioner." Such application should be made upon notice to all persons who have appeared in the probate proceeding, and a bond to indemnify the estate may be required as well as a sworn report as to the use made of the money so advanced. *Matter of Booth*, 119 Misc. Rep. 880, 198 N. Y. Supp. 343.

¶ 304 *Page 1523.*

Addition to subject of title not depending on probate.

Life estate.

The right of a life tenant created by a will is wholly independent of any rights or duties of the executor named in the will, and such life estate vests irrespective of the failure to

probate the will. *Matter of Matthewson*, 210 App. Div. 572, 206 N. Y. Supp. 734; *Alfred University v. Frace*, 193 App. Div. 279, 184 N. Y. Supp. 216.

¶ 306 Page 1529.

Continuation of subject of a devise in common or jointly.

Where a will was drawn by a competent lawyer and apparently a distinction was made between tenancy in common as to one class of property and joint tenancy as to another, the words will be given their legal significance. *Matter of Ward*, 124 Misc. Rep. 292, 208 N. Y. Supp. 413.

Page 1531.

Vested contingent remainder.

There may be an estate so given that there is more than a mere possibility of acquiring an estate. There may be an absolute right to have the estate if the contingency happens. It vests at the instant of testator's death and becomes an estate in possession later. It is such a right as the statute recognizes as a vested contingent remainder and is descendable.

Matter of Turner, 206 App. Div. 294, 200 N. Y. Supp. 476, *affd.* 239 N. Y. 83, 205 N. Y. Supp. 712.

Matter of Whalen, 143 App. Div. 743, 128 N. Y. Supp. 320.

Hennessy v. Patterson, 85 N. Y. 91.

Sage v. Wheeler, 3 App. Div. 38, 37 N. Y. Supp. 1107, *affd.* 158 N. Y. 679.

Roosa v. Harrington, 171 N. Y. 341.

Remainder contingent when there is a gift to a class, the time for ascertaining the membership of the class fixed.

Matter of Bindheim, 124 Misc. Rep. 424, 209 N. Y. Supp. 141.

Matter of Kimberly, 150 N. Y. 90.

Matter of Crane, 164 N. Y. 71.

Matter of King, 200 N. Y. 189.

Matter of Buechner, 226 N. Y. 440.

Matter of McKim's Estate, 115 Misc. Rep. 720,
185 N. Y. S. 767, 207 N. Y. Supp. 773.

Matter of Kissam's Estate, 115 Misc. Rep. 724,
186 N. Y. S. 263.

Page 1532.

Tenancy by entirety. Interest of tenant may be mortgaged or sold.

A tenant by the entirety may mortgage or sell his or her interest, which is a right to the use of an undivided half of the estate during the joint lives, and to the fee in case the grantor survives the co-tenant.

The grantee becomes a tenant in common with the husband or wife as the case may be, subject to the right of survivorship—in short, taking his or her place in respect to rights. *Hiles v. Fisher*, 144 N. Y. 306-316.

Either may sell or mortgage his or her interest in realty held under tenancy by entirety, which interest is the right to the use of an undivided half of the estate during the joint lives and the fee to the survivor. *Matter of Goodrich v. Village of Otego*, 216 N. Y. 112; *Hiles v. Fisher*, 144 N. Y. 306.

Husband and wife are tenants in common of rents.

Where property is held under tenancy by entirety there is a tenancy in common as to the rents, and as to the damages for trespass, but a damage to the free-hold is the property of both and such sum should be deposited in court awaiting the event of survivorship, and the income paid to them as tenants in common. *Matter of Goodrich v. Village of Otego*, 216 N. Y. 112; *Mastro-francisco v. Mohawk Gas Co.*, 201 App. Div. 586, 194 N. Y. Supp. 436.

Divorce severs the tenancy. See ¶ 310.

Absolute divorce which dissolves the marital relation, severs the tenancy by the entirety and the parties become tenants in common. *Stelz v. Shreck*, 128 N. Y. 263.

Page 1533.

Continuation of subject of gift per capita.

A stubborn rule of law bound the courts for many years to the holding that a gift to "issue" was to be treated as a gift per capita. The rule was often deplored. It yielded to a very faint glimpse of a different intention. It was followed when there was no escape, in submission to authority. A recent amendment of the Decedent Estate Law, § 47a (L. 1921, ch. 379) has wiped it out for the future. *N. Y. Life Ins. & T. Co. v. Winthrop*, 237 N. Y. 93.

The recent case, *Matter of Moody*, 122 Misc. Rep. 541, 204 N. Y. Supp. 301, says some of the earlier cases have been weakened, but not made obsolete by the enactment of § 47a, Dec. Est. L.

One means of ascertaining whether a gift is per capita or per stirpes is to inquire whether or not the beneficiaries take concurrently and equally. *Matter of Lawrence*, 238 N. Y. 116, reversing 200 N. Y. Supp. 931.

Time fixed for taking effect of gift, direction to pay to next of kin "equally," division per capita. *Matter of Bailey*, 124 Misc. Rep. 466, 209 N. Y. Supp. 137.

¶ 307 Page 1535.

Continuation of subject of liability of heir or devisee to pay mortgage debt.

Devise of property having a mortgage upon it, is a devise subject to the burden of the mortgage. *Farrell v. Farrell*, 206 App. Div. 209, 200 N. Y. Supp. 561.

¶ 309 Page 1540.

Continuation of subject of tenancy by the curtesy.

Tenancy by curtesy defined.

In 1 Bouvier's Law Dictionary (Rawle's Third Revision), p. 740, tenancy by the curtesy is defined as follows:

"The right of the husband to enjoy during his life land of which his wife is at any time during coverture seized in fee simple (absolute or defeasible) or in fee tail, provided there was issue, born alive, of the marriage."

Shackelton v. Annabel, 210 App. Div. 492, 206 N. Y. Supp. 446. Actual seisin does not necessarily mean physical possession.

Where the child never cried, but it breathed and its heart beat some minutes it was "born alive" and capable of inheriting so that estate by the curtesy attached. *Matter of Union S. Co.*, 89 Misc. Rep. 69, 151 N. Y. Supp. 246; *Sanford v. Getman*, 124 Misc. Rep. 80, 206 N. Y. Supp. 865.

Seized in possession.

A mother conveyed to her daughters reserving orally a life estate, and while the mother was in possession under the life estate one daughter died and it was held that this daughter was never seized in possession so that a curtesy attached.

Sanford v. Getman, 124 Misc. Rep. 80, 206 N. Y. Supp. 865.

McKinley v. Hessen, 202 N. Y. 24.

City of N. Y. v. N. Y. & So. Brooklyn Ferry, 231 N. Y. 18, 25.

Collins v. Russell, 184 N. Y. 74.

¶ 310 *Page* 1542.

Continuation of general subject of dower.

Dower in estates by entirety. See ¶ ¶ 93, 306.

The nature of estates by entirety precludes the idea of dower therein. The husband is not seized of an estate of inheritance (§ 190 R. P. Law) which is essential to the creation of a dower estate. *Matter of Dunn*, 236 N. Y. 461.

Dower as affected by divorce or judgment of annulment. See ¶¶ 455, 456. Schouler on Marriage, Divorce, &c., 6th Edition.

Dower in fee absolute in respect to creditors.

A person may have a "fee absolute" in real estate in respect to the rights of creditors, purchasers and incumbrances (Real Prop. L. § 149) but that is not such an estate as to give dower right to a man's widow. This rule has been applied where a husband had a right of use and disposition of real estate, with remainder over, under the will of a former wife. *Matter of Fisher*, 124 Misc. Rep. 836, 209 N. Y. S. 300; *Barr v. Howell*, 85 Misc. Rep. 330, 147 N. Y. S. 483.

Page 1544.

Dower—Dissolution of marriage.

The statute provides that dower is only forfeited (Real Property Law, § 196) in case of divorce dissolving the marriage contract for the misconduct of the wife. There is nothing in the statute under consideration (chapter 279 of the Laws of 1922) providing that an order entered thereunder bars dower. The statute provides a method by which the marriage relation may be terminated. It is in no sense an action for divorce and cannot be so regarded. "Absence" cannot be construed as "misconduct," and there

is nothing in the statute to indicate that the legislature intended it to be so construed. The statutory provision forbids the deprivation of the right of dower by implication, and it is only in this manner that the order entered in the proceeding under chapter 279 of the Laws of 1922 could be construed as a forfeiture of it. *Van Blaricum v. Larson*, 205 N. Y. 355, 41 L. R. A. (N. S.) 219, Ann. Cas., 553. The right of the wife in the husband's real estate is fixed by statute, and she can only be deprived of this right by legislative authority. *Ruckert v. Lasher*, 209 App. Div. 672, 205 N. Y. Supp. 552, affd. 240 N. Y. 32. After this decision section 196-a was added to the Real Property Law providing that dower be barred by dissolution of marriage.

§ 196-a. When dower barred by dissolution of marriage.

In case of a dissolution of the marriage because of the absence of the wife for five successive years, as provided in section seven-a of the domestic relations law, she shall not be endowed. (Added by Laws 1925, ch. 568, § 1. In effect April 9, 1925.)

¶ 311 Page 1550.

Addition to subject of bequest in lieu of dower.

Widow rejecting legacy and taking dower—re-imbursement of devisee.

The rule is reasonably well founded in this state that, upon the election of a widow to take her dower in the real property of which her husband died seized, instead of a legacy or devise under a provision of the will in lieu thereof, those who are so benefited by the election should contribute in proportion to the benefit received by them to make up the losses of those whose property is subjected to the charge of dower.

Where the widow of a testator declines to accept a provision of the will in lieu of dower, and elects to take her dower

in the real estate of which her husband died seized, the devisees of the real property upon which such dower interest becomes charged may have recourse to the property rejected by the widow, to indemnify them against their loss by reason of their devised property being subjected to the charge of dower. *Sarles v. Sarles*, 19 Abb. N. C. 322; *Matter of Farley*, 123 Misc. Rep. 564, 206 N. Y. Supp. 29.

¶ 313 Page 1556.

Royalties received for publication.

Since lapse of time generally reduces the value of any literary work and tends also to reduce the amount of royalties, the proceeds of the contract should be equitably proportioned between the life tenant and remainderman. *Matter of Elsner*, 210 App. Div. 575, 206 N. Y. Supp. 765.

¶ 313 Page 1557.

Continuation of subject of apportionment of interest.

Nature of income from savings bank deposits. See ¶ 296 Supplement.

Interest, so called, on deposits in savings banks should not be apportioned for no income is due until it is declared as a dividend. The amount when declared becomes income of the estate and not a part of the principal, and is payable to the person or persons who are entitled to income. *Matter of Mercer*, 117 Misc. Rep. 371, 192 N. Y. Supp. 317; *Matter Fithian*, 103 Misc. Rep. 568, 170 N. Y. Supp. 750, 189 N. Y. Supp. 301.

Apportionment of dividends.

For method of apportionment of stock dividends on shares of capital stock of Standard Oil of New York, Standard Oil of New Jersey, Standard Oil of California, Stan-

dard Oil of Indiana, Ohio Oil Company, see *Matter of Bemis*, 123 Misc. Rep. 255, 205 N. Y. Supp. 367.

¶ 314 Page 1558.

Apportionment of proceeds of unproductive property sold, as between income and principal.

Where there is real property in a trust which has to be carried out of income derived from other property, on a sale of such property the amount received should be apportioned between income and principal so that justice may be done to all persons interested. An interesting example of the method used in making such apportionment is found in *Matter of Pinkney*, 208 App. Div. 181, 202 N. Y. Supp. 818, *affd.* 238 N. Y. 602.

Holding poorly paying property under power of sale to disadvantage of life beneficiary.

Where an executor refrained from selling real estate which paid the life beneficiary little income for eight years, the court directed a sale of the property and that from the proceeds the life beneficiary be compensated for loss of income because of the unreasonable delay, under the rule in *Furniss v. Cruikshank*, 230 N. Y. 495 and *Matter of Shuster*, 123 Misc. Rep. 314, 205 N. Y. Supp. 268; *Matter of Walsh*, 124 Misc. Rep. 349, 207 N. Y. Supp. 763.

¶ 316 Page 1560.

Amendment to sec. 311 Sur. Ct. Act, relating to jurisdiction to take proof of heirship.

§ 311. Heir may apply to establish heirship.

Where a person, seized in fee of real property within the state, dies intestate, or without having devised his real property, his heirs, or any of them, or any person deriving title from or through such heirs, or any of them, may present *either* to the surrogate's court which has acquired jurisdiction of the estate, or, to the surrogate's court of a county where the real property, or any part thereof is situated, a petition, describing the real property, setting forth the

facts upon which the jurisdiction of the court depends, and the interest or share of the petitioner, and of each other heir of the decedent, in the real property, and praying for a decree establishing the right of inheritance thereto, and that all the heirs of the decedent may be cited to show cause why the prayer of the petition should not be granted. Upon the presentation of such a petition a citation must be issued accordingly, except in a case where the petitioner was a party to a judicial settlement, the decree upon which determined the rights of the parties to such real estate. (Amended by Laws 1923, ch. 531. In effect Sept. 1, 1923.)

¶ 317 Page 1562.

Addition to subject of trial with jury in proceedings for probate of heirship.

A jury trial of controverted questions of fact arising in proceedings for the probate of heirship may be had as of right in the Surrogate's Court, under the State Constitution, Article 1, Section 2, and the Code of Civil Procedure, Sections 2538 and 2766 (now Sur. Ct. Act, Sections 68, 312). *Matter of Bringgold*, 204 App. Div. 101, 198 N. Y. Supp. 282.

¶ 318 Pages 1567, 1568, 1569.

Amendment to sections 81, 84 and 85 Decedent Estate Law, prescribing the general rule of descent as affecting rights of parents.

§ 81. General rule of descent.

The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants.
2. To his father and mother or the survivor of them.
3. To his collateral relatives, as prescribed in the following sections of this article. (Amended by Laws 1923, ch. 393, § 1. In effect Sept. 1, 1923.)

§ 84. When one parent inherits.

If the intestate dies without lawful descendants, and the inheritance came to the intestate on the part of one of his parents, the whole of it shall pass to the parent from whom it was derived; if such parent be dead, the inheritance shall go to the surviving parent for life, and the reversion to the brothers and sisters of the intestate and their descendants according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or

sisters or their descendants living, such inheritance shall descend to the *surviving parent* in fee. (Amended by Laws 1923, ch. 393, § 1. In effect Sept. 1, 1923.)

§ 85. When both parents may inherit.

If the intestate die without descendants and the inheritance *is not controlled* by the last section, *it shall descend to the father and mother, or to the survivor of them* in fee. (Amended by laws 1923, ch. 393, § 1. In effect Sept. 1, 1923.)

§ 92. Cases not hereinbefore provided for.

In all cases not provided for by the preceding sections of this article, the inheritance shall descend, without distinction of sex, according to the rules of the common law; *and if there be no heirs who would take according to such rules, the inheritance shall descend to the husband or wife of the intestate.* (Amended by Laws 1925, chap. 606. In effect April 11, 1925.)

§ 80. Definitions and use of terms; effect of article.

1. The term "real property" as used in this article, includes every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate, seized or possessed thereof, or in any manner entitled thereto; leases for years, estates for the life of another person; and real property held in trust, not devised by the beneficiary. "Inheritance" means real property as herein defined, descended according to the provisions of this article.

2. The expressions "Where the inheritance shall have come to the intestate on the part of the father or "mother," as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent.

3. When in this article a person is described as "living," it means living at the time of the death of the intestate from whom the descent came; when he is described as having "died," it means that he died before such intestate.

4. This article does not affect a limitation of an estate by deed or will, or tenancy by the curtesy or dower. § 80, Dec. Est. Law.

Page 1567.

Continuation of subject of descent of real property.

Where a child never cried, but it breathed and its heart beat some minutes it was born alive and capable of inheriting real property. *Matter of Union T. Co.*, 89 Misc. Rep.

69, 151 N. Y. Supp. 246; *Sanford v. Getman*, 124 Misc. Rep. 80, 206 N. Y. Supp. 865.

Page 1571.

Continuation of subject of descent of real property.

“Shall have come on the part of”

The expression where the inheritance shall have come to the intestate on the part of the father or mother, as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent. Dec. Est. Law, § 80, sub. 2.

To entitle mother to inherit over the father where the property came from the mother's sister to her daughter, the mother's sister must be exclusively of her blood, and where the father was also a relative of the sister, the father will inherit. *Servine v. Andrews*, 121 Misc. Rep. 455, 201 N. Y. Supp. 386.

¶ 319 Page 1579.

Continuation of subject of implied trust.

Where the will gave the wife the use for life of an apartment house and other property, and the executors were directed to pay the expenses of maintaining the house in proper condition from the income, a trust was implied and the executors had the management and control of the property. *Matter of Security T. Co. of R.*, 232 N. Y. 109.

¶ 321 Page 1585.

Continuation of subject of power in trust.

A power in trust may be created only by a will, or by an instrument sufficient to pass an estate or interest in the property to which the power relates. Real Property Law

(Consol. Laws, c. 50), § 140, re-enacting in substance 1 R. S. 735, § 106; *Jennings v. Conboy*, 73 N. Y. 230, 234; *Farmer's L. & T. Co. v. Winthrop*, 238 N. Y. 477.

¶ 325 Page 1597.

Continuation of general subject of invalid accumulation of personal property.

Accumulation by means of stock dividends.

By the addition of section 17-a to the Personal Property Law permitting trusts to be created in stocks and stock dividends it is now provided that stock dividends may be directed to be added to the principal fund and such additions shall not constitute invalid accumulation. See ¶ 344 Supplement.

Page 1600.

Continuation of general subject of invalid accumulation with reference to merging income with principal.

Where a will creates a trust fund for educational purposes, and provides that an individual beneficiary shall repay the sum advanced, the sum not to become part of the principal, but to be reloaned as income, no accumulation takes place. *Matter of Davidge*, 200 App. Div. 437, 193 N. Y. Supp. 245, 201 N. Y. Supp. 649.

¶ 326 Page 1602.

Addition concerning taking over of bequests to executors for perpetual care of cemetery lot.

Executors may contract with cemetery association.

Many old wills contain bequests to the executor for the perpetual care of a lot in a cemetery, and there is no doubt that considerable trust money is deposited in banks for this purpose, many of which deposits may have been forgotten,

or the book handed down to some unauthorized person on the death of the executor. In cases where the cemetery association has been incorporated and has established a perpetual care fund, these funds can now be turned over to the corporation under an agreement with the executor, or his successor or with a trustee in accordance with provision made for such cases by an amendment to the law applicable to cemetery associations.

§ 85. Perpetual care of lots.

Every corporation organized under or subject to the provisions of this article shall adopt a reasonable and uniform scale of prices to be charged for the perpetual care of all lots in such cemetery, which shall be separate from and in addition to the amount fixed as the price at which such lots will be sold and conveyed, and upon the application of a prospective purchaser of any such lot and upon the payment by such purchaser of the purchase price and the amount fixed as a reasonable charge for the perpetual care of such lot, as herein provided, shall include in the deed of conveyance an agreement to perpetually care for such lot. Such corporation shall also, upon the application of an owner of any lot and upon the payment of the amount fixed as a reasonable charge for the perpetual care of such lot, enter into an agreement with such owner to perpetually care for such lot. Such agreement shall be executed in the same manner as a deed is required to be executed and may be recorded as a deed of real property in the office of the clerk of the county in which such cemetery is located. On and after entering into such contract with such purchaser or owner it shall be the duty of such corporation at all times thereafter to properly care for such lot. *Any corporation organized under or subject to the provisions of this article which maintains and has set up a perpetual care fund for the perpetual care of lots in its cemetery may enter into an agreement in writing with any executor or executors, trustee or trustees, under a last will and testament, to whom there has heretofore been, or may hereafter be, bequeathed a sum for the perpetual care of any lot or lots in any such cemetery or with any administrator or administrators with the will annexed under any such will perpetually to care for such lot or lots under the provisions of the terms of such last will and testament, and subject in all cases to the approval of the surrogate's court having jurisdiction over such trust estate. Such approval shall be evidenced by the written endorsement of the surrogate on a duplicate original of such agreement filed in the surrogate's court. In case the surrogate shall approve such agreement any such executor, trustee or administrator with the will annexed thereupon shall pay over to the treasurer of such perpetual care fund of such cemetery association any moneys remaining or being in his hands belonging to such trust, and upon making such payment and accounting therefor to the surrogate's court may be discharged from said trust as such*

executor, trustee or administrator with the will annexed. (Added to Membership Corporations Law by Laws 1912, ch. 315, and amended by Laws 1925, ch. 75, § 1. In effect March 3, 1925.)

Another extension of power of a cemetery corporation to receive and hold funds for the care and improving of burial grounds situated outside the cemetery property, and outside a city of more than one million inhabitants, was granted by section 65-a of the Membership Corporations Law.

§ 65-a. Trusts for the care and improvement of burial ground.

A cemetery corporation, incorporated under or by a general or special law, may receive tangible property, securities or funds in trust, and hold and invest the same and apply the principal or income thereof in accordance with the terms of the trust, for the purpose of repairing, maintaining, improving or embellishing a burial ground, not constituting a part of the cemetery of such cemetery corporation, and located outside of a city of more than one million inhabitants and within three miles of the cemetery of the corporation accepting such trust. The directors of such corporation, or a majority of them, shall make, sign and file, at the annual meeting, a report countersigned by the treasurer, concerning the trust funds held under this section and the use made of such funds or of the income thereof. (Inserted by Laws 1925, ch. 508, § 1. In effect April 9, 1925.)

¶ 328 Page 1608.

Addition to subject of charitable trusts.

Gift to one religious society to be paid to another when formed.

A gift was made to the First Church of Christ, Scientist, to be paid to a church or society of similar belief when formed, and it was held that the gift was good. *Matter of Briglin*, 208 App. Div. 511, 203 N. Y. Supp. 646, followed 208 Supp. 947.

¶ 329 Page 1612.

Continuation of subject of suspension of power of alienation.

Death of one of three life beneficiaries before testator.

Where the life use of real estate was devised to three persons, and the devise was therefore invalid, the death of

one of the three before that of testator made the devise valid because a will speaks from the date of the death of the testator, and at that time the power of alienation was suspended for only two lives in being. *Adams v. McKee*, 121 Misc. 215, 200 N. Y. Supp. 765.

¶ 331 Page 1622.

Continuation of subject "Trusts until youngest child arrives at a specified age."

Trusts which provide that the fund shall be held "until such time as my youngest surviving grandchild shall attain the age of twenty-five years" will be held to be invalid if the language requires a construction that it is the intention of the testator to have the fund held until the time when the survivor of several grandchildren shall attain that age. In such a case two or three "youngest" grandchildren may die during the continuance of the trust and the one who first attains the age of twenty-five years may be the oldest grandchild living at the death of the testator.

Where the language and the scheme of the will permits the construction, in order to save the trust, the courts will construe "the youngest surviving grandchild" to mean the youngest child living at the death of the testator. *Matter of Petition of Rounds (Dutton's Will)*, 105 Misc. Rep. 173, 172 N. Y. Supp. 758; *Coston v. Coston*, 118 App. Div. 1, 103 N. Y. Supp. 307; *Matteson v. Palser*, 56 App. Div. 91, 67 N. Y. Supp. 612. Affirmed 173 N. Y. 404. *Boecher v. Smada Realty Co.*, 164 App. Div. 837, 150 N. Y. Supp. 263.

¶ 332 Page 1626.

Continuation of subject of assignability of trust benefits.

There seem to be a few cases where the beneficiary of income has given an order to pay income to another or appointed an attorney in fact to receive the income, and in

those cases such payment by the trustee has been upheld. Such an order or appointment may border closely on an assignment, but the distinction has been made that it is revocable at will and so does not convey any right of enforcement. *Matter of Oakley*, 116 Misc. Rep. 494, 190 N. Y. Supp. 157, affd. 201 N. Y. Supp. 929, 207 App. Div. 811.

¶ 333 Page 1631.

Continuation of subject of right to exercise power of sale after death of beneficiary of trust.

A power of sale given to trustees of a residuary estate where, upon the death of a beneficiary, there is further direction to divide the trust estate among remaindermen, does not end with the death of the beneficiary, but may be exercised for the purposes of the final division of the estate. *Hutkoff v. Winmar Realty Co.*, 208 N. Y. Supp. 25. See also Fiero on Particular Actions and Proceedings (4th Ed.), Vol. 3, page 2577.

¶ 335 Page 1635.

Continuation of subject of sale of trust property on application to the court.

The granting of an application for permission to sell trust lands does not necessarily approve a contract set up in the petition, but after the permission is given, the contract should be submitted to the court for approval. *Matter Loewus*, 207 App. Div. 816, 202 N. Y. Supp. 406.

Page 1636.

Amendment to sec. 106 Real Property Law, relating to leases by trustees.

§ 106. When trustee may lease trust property.

A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the

use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The supreme court may, by order, on such terms and conditions as seem just and proper, in respect to rentals and renewals, authorize such a trustee to lease such real property for a term exceeding five years if it appears to the satisfaction of the court that it is for the best interest of the trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the term, or renewed term, to the lessee the then fair and reasonable value of any building which may have been erected on the premises during such term. *The supreme court, on the application of any trustee, may, by order, confirm any lease for a longer term than five years, made before or after this section as amended takes effect, without the prior authorization of the court, and such order, on the entry thereof, shall be binding on all persons interested in the trust estate.* (Amended by Laws 1923, c. 644, § 1. In effect May 22, 1923.)

Trusts—leasing.

Real Property Law, § 106, requiring trustees to obtain consent of the Supreme Court to lease real property for more than five years, is not applicable where the will expressly authorizes leases for a term extending beyond the duration of the trust. *Raynolds v. Browning, King & Co.*, 123 Misc. Rep. 367, 205 N. Y. Supp. 748.

A lease for five years and before that term expires another lease for five years, the life tenant dying, contravenes the statute, §§ 105, 106 Real Prop. Law. *39 Cortland St. Corp. v. Lambert*, 209 App. Div. 575, 205 N. Y. Supp. 161.

Under such circumstances the renewal provision is invalid and a tenant holding over becomes a yearly tenant. *Aimone Mfg. Co. v. Schultz*, 210 App. Div. 41, 205 N. Y. Supp. 170.

¶ 336 Page 1638.

Continuation of subject of investments directed by will.

Where the will authorizes the trustee "to keep the principal thereof invested so as to bring in the largest income compatible with reasonable safety of the principal" it authorizes the trustee to invest in other than legal securities, but such investments must conform strictly to the

character described. *Matter of Leonard*, 118 Misc. Rep. 598, 193 N. Y. Supp. 916.

An executor authorized to invest in non-legal securities will not necessarily be absolved from making improvident investments because of advice from trust company. *Matter of Hurlburt*, 210 App. Div. 456, 206 N. Y. Supp. 448.

Pages 1640, 1641.

Amendment to Section 111, Dec. Est. Law and Section 21, Personal Property Law to include "a bank authorized to conduct a trust department."

§ 111. Investment of trust funds.

An executor, administrator, trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned thereon, and in shares or parts of such bonds and mortgages, provided that any share or part of such bond and mortgage so held shall not be subordinate to any other shares thereof and shall not be subject to any prior interest therein, and provided further that bonds and mortgages in parts of which any fiduciary may invest trust funds together with any guaranties of payment, insurance policies and other instruments and evidences of title relating thereto shall be held for the benefit of such fiduciary and of any other persons interested in such bonds or mortgages by a trust company, *a bank authorized to conduct a trust department* or title guaranty corporation organized under the laws of this state, and that a certificate setting forth that such corporation holds such instruments for the benefit of such fiduciary and of any other persons who may be interested in such bond and mortgage among whom the corporation holding such instruments may be included, be executed by such corporation and delivered to each person who becomes interested in such bond and mortgage. Every corporation issuing any such certificate shall keep a record in proper books of account of all certificates issued pursuant to the foregoing provisions. An executor, administrator, trustee or other person holding trust funds may require such personal bonds or guaranties of payment to accompany investments as may seem prudent, and all premiums paid on such guaranties may be charged to or paid out of income, providing that such charge or payment be not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself. Whenever any trust funds are invested in the shares

of a savings and loan association, organized under the laws of this state, at the time said funds shall come into the possession of any executor, administrator, trustee or other person, entitled to hold the same, the investment of such funds in the shares of such savings and loan association may be continued, provided, however, the total amount of trust funds invested in the shares of such savings and loan association shall not exceed the amount of its guaranty fund.

Section twenty-one of the Personal Property Law amended to read as follows:

§ 21. Investment of trust funds.

A trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned thereon, and in shares or parts of such bonds and mortgages, provided that any share or part of such bond and mortgage so held shall not be subordinate to any other shares thereof and shall not be subject to any prior interest therein, and provided further that bonds and mortgages in parts of which any trustee may invest trust funds together with any guaranties of payment, insurance policies and other instruments and evidences of title relating thereto shall be held for the benefit of such trustee and of any other persons interested in such bonds and mortgages by a trust company, *a bank authorized to conduct a trust department* or title guaranty corporation organized under the laws of this state and that a certificate setting forth that such corporation holds such instruments for the benefit of such trustee and of any other persons who may be interested in such bonds and mortgages among whom the corporation holding such instruments may be included, be executed by such trust company or title insurance corporation and delivered to each person who becomes interested in such bond and mortgage. Every corporation issuing any such certificate shall keep a record in proper books of account of all certificates issued pursuant to the foregoing provisions. A trustee or other person holding trust funds may require such personal bonds or guaranties of payment to accompany investments as may seem prudent, and all premiums paid on such guaranties may be charged to or paid out of income, providing that such charge of payment be not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself. Whenever any trust funds are invested in the shares of a savings and loan association, organized under the laws of this state, at the time said funds shall come into possession of any trustee or other person, entitled to hold the same, the investment of such funds in the shares of such savings and loan association may be continued, provided, however, the total amount of trust funds invested in the shares of such savings and loan association

shall not exceed the amount of its guaranty fund. (Both sections amended by Laws 1925, chap. 604. In effect April 11, 1925.)

Page 1642.

Addition to sec. 116, Real Property Law, as amended to allow investments by fiduciaries and life tenants in property in which they have an interest when sold to a corporation.

§ 116. Executors', fiduciaries' and trustees' investments in certain stocks regulated.

Whenever an executor, trustee, guardian of an infant, committee of a lunatic, or other person or persons acting in a fiduciary capacity, or a life tenant, is entitled to receive the proceeds of the sale of any real property *or any interest therein* sold or to be sold and the said property has been or is about to be purchased by a corporation formed or to be formed for such purpose, and all adult beneficiaries and also all adult persons having a vested interest or estate in possession, reversion or remainder in the proceeds of such sale have agreed, or desire to agree that their share of such proceeds shall be invested in the stock and bonds or in either the stock or bonds of such corporation, then the said executor, trustee, guardian, committee or other person or persons acting in a fiduciary capacity, or the life tenant or tenants, may, with the approval of the supreme court, invest his share of the proceeds of such sale in the stock or bonds of such corporation, provided, however, that such corporation shall be prohibited by its certificate of incorporation from investing in any stocks, bonds, or other securities other than real estate which are not under the laws of this state a proper subject for the investment of trust funds. The supreme court shall not grant an order permitting such an investment, unless it appears to the satisfaction of such court that a written notice stating the time and place of the application for such leave has been served upon every beneficiary and also upon every person in being having a vested interest or estate in possession, reversion or remainder, in such proceeds at least eight days before the making thereof, if such beneficiary or other person is an adult within the state; or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee, until proof of the service on such beneficiary or other person such notice as the court or a justice thereof prescribes. The court shall appoint a special guardian for any minor and for any lunatic, person of unsound mind, or habitual drunkard, who shall not be represented by a committee duly appointed. The application must be by petition duly verified, must be made by the executor, trustee, guardian of an infant, committee of a lunatic, or such other person or persons acting in a fiduciary capacity, or a life tenant, entitled to receive the proceeds of such sale, and shall set forth the reasons for such investment and the nature thereof and the peculiar facts which make it proper that the application shall be granted. After taking proof of the facts either before the court or a referee, and hearing the parties and fully examin-

ing into the matter, the court must make a final order upon the application. In case the application is granted, the final order must authorize the said executor, trustee, guardian of an infant, committee of a lunatic, or other person or persons acting in a fiduciary capacity, or life tenant, so entitled to receive the proceeds of such sale, to make such investment upon such terms and conditions as the court may therein prescribe. (Amended by Laws 1924, ch. 414. In effect immediately.)

§ 337 Page 1642.

Continuation of subject of investments by trustee.

The duty devolving upon a trustee in making investments for the trust fund is well understood. He may, by statutory authority, without risk to himself, make certain investments. See Decedent's Estate Law, § 111, as amended; Personal Property Law, § 21, as amended; Banking Law, § 239, as amended. Beyond that, in making investments he is held to the duty to be faithful, diligent, and prudent in an administration entrusted to him in confidence in his fidelity, diligence and prudence (*King v. Talbot*, 40 N. Y. 76, 84); and, while he is not a guarantor of the safety of the securities in his charge belonging to the estate, he is bound to exercise such prudence and diligence in the care and management of the estate as men of discretion and intelligence in general employ in their own like affairs. *McCabe v. Fowler*, 84 N. Y. 314. He must exercise sound discretion, as well as good faith and honest judgment. *Matter of Hall*, 164 N. Y. 196, 200. Failing in this duty, and acting in contravention of principles which the law charges him to observe, he is guilty of constructive fraud, regardless of his motives or intentions (*Costello v. Costello*, 209 N. Y. 252), and becomes liable to the trust fund for the loss by reason of the investment (*In re Stark's Estate* [Surr.] 15 N. Y. S. 729). His duty is not discharged when he has taken securities, but he must be actively vigilant to ascertain whether or not the investment is unsafe and insecure and constantly growing more so; and for want of reasonable care in that respect he is chargeable

for the losses caused by depreciation. *Villard v. Villard*, 219 N. Y. 482.

Under no pretext whatever may trust funds be used for engaging in wild speculation or for the trustee's individual benefit. To so use them is illegal, and constitutes a devastavit, and the funds may be reclaimed, not only from the trustee, but from any one receiving them with notice.

Deobold v. Oppermann, 111 N. Y. 531.

Moore v. American Loan & Trust Co., 115 N. Y. 65.

Matter of Myers, 131 N. Y. 409.

Steele v. Leopold, 135 App. Div. 247, 120 N. Y. S. 569, conditionally modified 201 N. Y. 518.

Matter of Cady, 211 App. Div. 373, 207 N. Y. Supp. 385.

Page 1644.

Continuation of subject of retaining or selling investments made by testator.

Language in the will directing certain bonds to be held will be construed by the courts from the standpoint of the protection of trust funds rather than blind obedience to the language used by the testator. Thus in *Bigelow v. Tilden*, 52 App. Div. 390, 65 N. Y. S. 140, the First Department, in construing the will of Samuel J. Tilden, held that the language did not prohibit the sale of the securities in the trust fund. Again, in *Matter of Varet's Estate*, 181 App. Div. 466, 168 N. Y. S. 896, aff. 224 N. Y. 573, where the will directed the executor to sell and convert all the real and personal estate "as soon as may be after my decease," it was held that the discretion of the executor remained unfettered, provided he acted in good faith and that he was not required to sell forthwith upon the issuance of letters testamentary to him. The opinion of Mr. Justice Scott in that case cited

Chanler v. New York El. R. Co., 34 App. Div. 305, 307, 54 N. Y. S. 341, 342, and quoted therefrom as follows:

“ ‘It is well settled that where an absolute power of sale is conferred upon an executor, the addition of words suggesting a time for its exercise, or indicating the testator's desire in that regard, do not restrain or limit the action of the executor.’ ”

This rule has likewise been applied to trustees. See, also,

Robert v. Corning, 89 N. Y. 225.

Guaranty Trust Co. of New York v. United States Steel Corporation, 107 Misc. Rep. 720, 176 N. Y. S. 402, affirmed 187 App. Div. 889, 174 N. Y. S. 904, affirmed 226 N. Y. 693.

Toronto Gen. Trusts Co. v. Chicago, B. & Q. R. Co., 64 Hun, 1, 18 N. Y. S. 593, affirmed 138 N. Y. 657.

Matter of Wotton, 59 App. Div. 584, 69 N. Y. S. 753, affirmed 167 N. Y. 629.

Matter of Pressprich, 124 Misc. Rep. 15, 207 N. Y. Supp. 412.

¶ 338 Page 1646.

Continuation of subject of setting apart trust funds.

Establishing a trust fund is not giving a “legacy” in the sense that the fund can not be set up until the end of a year, under sec. 218, Sur. Ct. Act, prohibiting payment of a legacy within a year. *Matter of Ahern*, 203 App. Div. 30, 196 N. Y. Supp. 313.

¶ 339 Page 1650.

Continuation of subject of reaching trust income for benefit of husband or wife.

A separation agreement by which the husband directs the trustees of a testamentary trust for his benefit to pay his

wife a fixed sum for her support may be enforced in Surrogate's Court which has control of the trustees. *Matter of Yard*, 116 Misc. Rep. 19, 189 N. Y. Supp. 190.

¶ 344 Page 1658

Continuation of general subject of allotment of dividends as between income and principal particularly where stock dividend has been declared.

The question whether dividends declared on stock held in trust with remainder over were income or principal has given rise to many confusing decisions. Since stock dividends have become frequent the rights of life beneficiary and remainderman have become of great importance, and recent legislation has been enacted with the purpose of fixing those rights.

To that end the definition of "income of personal property," found in § 10 Pers. Prop. Law, has been amended so that certain stock dividends are excluded.

§ 10. Definitions.

The term "income of personal property," as used in this article, means the income or profits arising from personal property, and includes the interest of money and the produce of stock, *but excludes the stock dividends described as principal in section seventeen-a.* (Amended by Laws 1922, ch. 452, § 1. In effect April 3, 1922.)

There has been added to the Personal Property Law, sec. 17a, providing that where a trust is created in stock any stock dividend may be declared in the instrument creating the trust to be principal and not income.

§ 17-a. Stock dividends.

A will, deed or other instrument, which shall hereafter be executed and create or declare a trust, may declare any dividend payable in the stock of the corporation or association declaring or authorizing the same, and declared or authorized hereafter in respect of any stock composing, in whole or in part, the principal of such trust, to be in whole or in part principal and not income of such trust. The addition of any such stock dividend to the

principal of such trust shall not be an accumulation of income within the meaning of this article. (Inserted by Laws 1922, ch. 452, § 2. In effect April 3, 1922.)

¶ 347 Page 1669.

Amendment to sec. 80, Domestic Relations Law, making rights of parents equal as guardians in socage.

§ 80. Guardians in socage.

Where a minor for whom a general guardian of the property has not been appointed shall acquire real property, the guardianship of his property with the rights, powers and duties of a guardian in socage belongs:

1. To the *parents jointly, or, if they be separated, or divorced, to the parent who has been given the custody of the minor by a decree of court, or in the absence of such a decree, to the parent having the actual custody of the minor;*

2. *If one of the parents be dead, to the sole surviving parent;*

3. *If there be no father or mother, to the nearest and eldest relative of full age, not under any legal incapacity.*

The rights and authority of every such guardian shall be superseded by a testamentary or other guardian appointed in pursuance of this article, *or in pursuance of article ten of the Surrogate's Court Act.* (Amended by Laws 1924, chap. 439 and last clause added by Laws 1925.)

¶ 348 Page 1674.

Continuation of subject as to what an infant may not lawfully do.

An infant may not lawfully appoint an agent, and any transactions consummated through the person whom an infant assumes to appoint is not voidable but void. *Casey v. Kastel*, 119 Misc. Rep. 116, 195 N. Y. Supp. 848, affirmed 206 App. Div. 793, 200 N. Y. Supp. 790, mod. 237 N. Y. 305.

¶ 352 Page 1684.

Addition of new subject concerning support of infant from property of absconding parent.

Personal property and income of real estate of absconding parent may be applied to the support of a minor child.

These sections of the Poor Law were amended by Laws 1924, chap. 471, and now read as follows:

§ 130. When property of absconding persons to be applied to support of families; how application made.

Whenever the father, or the mother has absconded or shall abscond from his or her children, or a husband from his wife, or a wife from her husband, leaving any of such children or such wife or husband chargeable, or likely to become chargeable upon the public for their support, and any real or personal estate of such father, or mother, or husband, or wife, has been or shall be seized by a superintendent of the poor or an overseer of the poor, or by a board of charities, or by other officers authorized to make such seizure, by warrant of the justices of the peace of the county where such real or personal property may be situated; and the county court of the county wherein such superintendent or overseer of the poor, or board of charities, or other officers authorized to make such seizure resides, or other court having jurisdiction thereof, has confirmed, or shall confirm said warrant and seizure, and has heretofore directed or shall hereafter direct what part if any of said personal property shall be sold, and how much if any of the proceeds of such sale and of the rents and profits of the real estate, if any, be applied toward the maintenance of the children or wife or husband of the person so absconding; then the said superintendent or overseer of the poor, board of charities or other officers so authorized and directed, shall apply the said proceeds of sale of said personal property, or rents and profits of the real estate as the case may be, first, to the payment of such taxes and assessments as may be outstanding and existing liens upon the said real estate, and repairs necessary to be made upon said real estate, and premiums for insurance on the buildings on said real estate; and the balance if any, directly to the maintaining, bringing up and providing for the wife, husband, child or children so left and abandoned, as the same be required from time to time; and for all such expenditures they shall take proper vouchers, and from the rents and profits thereafter received from any real estate so seized they shall first pay all legal taxes and assessments, as they shall be assessed against said real estate, and such premiums for insurances and expenses for such repairs thereon as they may deem necessary for the protection and preservation of said real estate, and the balance of said rents and profits shall be applied by said overseers, superintendents, boards of charities, or other persons authorized to make such seizures, to the maintaining, bringing up, and providing for the wife, husband, child or children so left and abandoned, and proper vouchers shall be taken thereof.

§ 131. Guardians for minors: proceeds not to be mingled with other funds: officer to give security and to account.

Whenever any child or children, entitled to the benefits provided by this article, shall be a minor or minors and such minor or minors shall have no surviving parent who has not absconded and no guardian, the county court or other court having jurisdiction of this matter shall appoint some suitable person guardian ad litem or next friend of such minor or minors, whose duty it shall be to see that the provisions of this article are carried into effect. The proceeds

of the sale of said personal property and the rents and profits of said real estate shall not be mingled or placed with any other funds held or owned by the officer or officers receiving the same, but shall be kept separate and distinct. Such superintendent, overseer of the poor, board of charities or other authorized officer shall give security for the faithful performance of the duties hereby imposed in such form and in such sum as the aforesaid court may direct, and shall account to the court for all moneys so received by them and for the application thereof from time to time and may be compelled by the said court to render such account at any time.

§ 132. Notice of accounting.

Notice of such accounting shall be given to the wife or husband or children, so left and abandoned, as the case may be, and to the guardian of such children, if any of them be minors. And in the event that no guardian or next friend has been appointed, as hereinbefore provided, the said court shall, prior to such accounting being had, appoint some suitable person to attend upon such accounting in behalf of said minors, and notice of such appointment and of such accounting shall be given to the person so appointed.

§ 133. Penalties, how applied.

All penalties received from the prosecution of any recognizance given by any person who shall have abandoned or neglected his wife or husband or children, or who shall have threatened to run away and leave his wife or husband or children a burden on the public, shall be retained by the officer at whose instance such recognizance was prosecuted, and applied for the same purpose and in the same manner as in section one hundred and thirty of this chapter provided for the disposition of the proceeds of the sale of personal property and the rents and profits of real estate seized under the provisions of this article. (This act shall take effect September first, nineteen hundred and twenty-four.)

¶ 355 Page 1687.

Continuation of subject of concurrent jurisdiction.

Since the surrogate's court has been given a more complete jurisdiction, the supreme court is decidedly against taking jurisdiction in cases where such jurisdiction is concurrent:

Construction of will on judicial settlement of accounts of trustees. *Farmers L. & T. Co. v. Markol*, 201 N. Y. Supp. 247.

Construction of will before termination of life tenancy. *U. S. Trust Co. v. Hayes*, 201 N. Y. Supp. 249.

Construction of will on application of trustee in bankruptcy where life estate is not ended. *Tracy v. Coyle*, 201 N. Y. Supp. 250, 121 Misc. Rep. 526, followed 208 N. Y. Supp. 845.

¶ 361 Page 1704.

Addition to discussion of distinction between filing intermediate account for information and for judicial settlement.

Intermediate accounting and intermediate judicial settlement. Objections.

An intermediate account may be filed when desired, and such account may not be subject to objections or to a reference of the objections (*Matter of Appell*, 197 App. Div. 631, 189 N. Y. Supp. 510, 234 N. Y. 40), but an intermediate account filed for the purpose of having an intermediate judicial settlement is subject to objections and trial of any issue raised.

¶ 378 Page 1751.

Amendment to Section 262, Sur. Ct. Act, regarding citation on voluntary judicial settlement.

§ 262. Voluntary judicial settlement; citation.

Upon a voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee there must be cited:

1. All creditors or persons claiming to be creditors of the decedent, except such as by vouchers filed with the account appear to have been paid.

2. The sureties on his official bond, if any.

3. All co-executors, administrators, guardians or trustees who do not join in the petition.

4. The successor, if a successor has been appointed, in a case where the petitioner's letters have been revoked, or he has been removed, and if no successor has been appointed, all persons interested who are required to be cited by this section.

5. The attorney-general in all cases where the decedent, ward or beneficiary died intestate as to any part of the estate or fund leaving no known heir-at-law or next of kin.

6. The widow or husband, if any, and all the heirs-at-law where the decedent,

ward or beneficiary died intestate as to any real property, and all his next of kin where he died intestate as to any personal property, *except such next of kin as, by voucher and release acknowledged, or proved and duly certified and filed, appear to have been fully paid.*

7. All devisees, all trustees of any trust created by the will, and all legatees, except such as by voucher and release acknowledged, or proved, and duly certified and filed, appear to have been fully paid.

8. In the case of a guardian, there shall also be cited all persons who might have presented a petition for a compulsory settlement.

9. In the case of a trustee there shall also be cited all persons who are entitled, absolutely or contingently, by the terms of the will or by operation of law, to share in the fund, or in the proceeds of property held by the petitioner as a part of his trust.

Where any person required to be cited has died, his executor or administrator shall be cited, and if no legal representative has been appointed, the husband or widow and all the heirs-at-law or next of kin, or both, of such deceased person, who are interested. (Amended by laws 1925, ch. 578, § 1. In effect Sept. 1, 1925.)

¶ 383 Page 1763.

Continuation of subject "Demanding trial with jury on accounting." See ¶ 223 Supplement.

In *Matter of Stark*, 118 Misc. Rep. 240, 193 N. Y. Supp. 231, Surrogate Cohalan wrote as follows:

With objections filed to this administrator's account is a demand for jury trial. The application must be denied. Sections 67 and 68, S. C. A., gives to parties in proceedings in surrogate's courts the right to a jury trial of issues of fact, in probate proceedings and in any other proceedings where there is an issue of fact "of which any party has constitutional right of trial by jury."

"Constitutional right" refers to the following provisions in article I, section 2, of the existing Constitution, which was ratified in 1894 and went into effect in 1895. "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." "Heretofore used" means prior to the adoption of the Constitution of 1894. *Wynehamer v. People*, 13 N. Y. 378; *Matter of Reinhardt*, 92 Misc. Rep. 96, 98, 156 N. Y. Supp. 171. Jury Trials in Surrogate's Courts were first authorized by chapter 443, Laws of 1914. Since their creation by the Act of March 16, 1778 (Laws 1778, c. 12), these courts have been deciding questions arising in executors' and administrators' accountings. In fact, this jurisdiction over accounts of representatives of estates goes back to the colonial governors, who, ex officio, were judges of the Prerogative Court, or Court of Probates. As early as 1686 Governor Dongan was exercising such powers. Prior to the adoption of the

present Constitution there was no trial by jury of such cases. Even in the common-law courts there never was and is now no constitutional right of trial by jury of issues of fact arising in the examination of a long account. *Malone v. Saint Peter & Paul's Church*, 172 N. Y. 269; section 466, C. P. A., formerly section 1013, C. C. P. This section has its origin in an act passed in 1768. Such provision has been in the Code of Civil Procedure since its adoption, and before that was in the Revised Statutes.

Surrogate Foley has recently reviewed the cases bearing upon the right to a jury trial in accounting proceedings and has refused to grant such an application. *Matter of Beare*, 122 Misc. Rep. 519, 203 N. Y. Supp. 483.

¶ 386 Page 1770.

Correction.

The reference at about the middle of the page to Sur. Ct. Act, § 218, should be § 210.

¶ 391 Page 1777.

Continuation of subject of good will as an asset. See ¶ 199.

Good will of a long established business.

It has not generally been considered that in winding up the affairs of an ordinary business, the executor or surviving partner should be charged with a sum for "good will" in addition to what may be obtained by making an advantageous sale.

But where the business has been large, profitable, widely known, and having first class credit, the item of "good will" has been considered important and an asset that should be accounted for.

Matter of Halle, 103 Misc. Rep. 661, 170 N. Y. Supp. 898.

Peo. ex rel. Johnson & Co. v. Roberts, 159 N. Y. 70.

Matter of Silkman, 121 App. Div. 202, 105 N. Y. Supp. 872.

Niles v. Fenn, 12 Misc. Rep. 471, 33 N. Y. Supp. 857.

Read v. Mackay, 47 Misc. Rep. 435, 95 N. Y. Supp. 935.

Matter of Brown, 208 N. Y. Supp. 359.

Ascertaining value of good will.

In *Matter of James S. Bolton*, 121 Misc. Rep. 51, at page 52, 200 N. Y. S. 325, 327, Surrogate Schultz, writing the opinion of the court, says:

“In ascertaining the value of the good will, the approved method is to obtain the average yearly net profit extending over a period of years, after deducting interest at 6 per cent. on the amount of capital invested each year (*Matter of Seaich*, 170 App. Div. 686, affirmed 219 N. Y. 634; *Matter of Ball*, 161 App. Div. 79, 211 App. Div. 673, 226 N. Y. 392; *Matter of Silkman*, 121 App. Div. 202, affirmed 190 N. Y. 560; *Von Au v. Magenheimer*, 115 App. Div. 84, 126 App. Div. 257, affirmed 196 N. Y. 510), and then to take a number of years' purchase of the balance. There is no hard and fast rule as to the number of years of which an average shall be obtained, nor as to the number of years' purchase that shall be taken. See cases cited in *Matter of McMullen*, 92 Misc. Rep. 637, 157 Supp. 655. In each instance the particular circumstance must be considered.”

¶ 397 Page 1789.

Continuation of subject of personal property in the joint names of husband and wife.

In the recent case of *Matter of Blumenthal*, 236 N. Y. 448, by a divided court, it was held that a mortgage taken to A. B. and H. B., his wife, was not joint property and so passed to the wife, the husband dying first, but that they owned the mortgage as tenants in common. In this case the mortgage was taken for a part of the selling price of land owned by entirety. The argument of the court was that it did not appear that it was the intention of the husband that

the security should be held jointly, and that that point differentiated the case from others.

This case may now be said to establish this rule, which differs from the general understanding, that a mortgage or bank deposit standing in the name of husband and wife is not from that alone joint property, but is owned in common, and the taking of a security or opening a bank account in that way is no evidence of intention to make it joint property. However, if the deposit had formerly been the money of the husband or wife, the change would be evidence of intention.

Where there was no proof of a gift, intent that the survivor should take, or who furnished the funds to purchase the securities, it was held in *Matter of Kimball*, 124 Misc. Rep. 181, 207 N. Y. Supp. 757, that the owners held as tenants in common, as provided in sec. 66, Real Prop. Law.

The intention that a man and wife are joint owners with survivorship, when established, prevails over the presumption that they are owners in common. *Cogan v. Taylor*, 208 N. Y. Supp. 121.

The rule seems to be settled that where one takes title from his own name and puts it in the name of himself and wife, there is a presumption of intention to create a survivorship. On the contrary, where it does not appear who owned the property in the first instance, or where it does appear that it was purchased with the joint funds of both, then there is no presumption; in the latter case, the presumption is of ownership in common. *Matter of Larmone*, 208 N. Y. Supp. 491.

“Or,” “and.”

The same rule applies whether the word “or” or “and” is used. *Matter of Meehan*, 59 App. Div. 156, 69 N. Y. Supp. 9; *Matter of Larmone*, 208 N. Y. Supp. 491.

¶ 403 Page 1803.

Addition to subject of liability of a co-representative for misappropriation or waste of the other.

Sureties not liable.

A co-administrator is not liable for the fraudulent acts of his associate not participated in by him, and the sureties on his official bond, although the bond be joint and several, can not be held liable for such acts. *Childs v. National Surety Co.*, 208 N. Y. Supp. 108; *Nanz v. Oakley*, 120 N. Y. 84.

¶ 405 Page 1807.

Continuation of subject of paying expenses of administration and inserting same in account.

This section (§ 222) refers to expenses incurred in the ordinary administration of the estate, and not to expenses of an accounting or judicial settlement, and the fact that the charge in the accounting proceeding has been paid does not bring the payment under this section. *Matter of Eddy*, 207 App. Div. 162, 201 N. Y. Supp. 760.

¶ 414 Page 1826.

Continuation of subject of allowing creditor over-payment.

By a long line of decisions it has been held that where a legatee has been over-paid the Surrogate can not give any affirmative relief to the executor by way of judgment or decree.

In *Matter of Wiemann*, 119 Misc. Rep. 239, 195 N. Y. Supp. 957, it was held that the enlarged jurisdiction under section 40 of the Surrogate's Court Act as amended by Chap. 439, L. 1921, has so broadened the jurisdiction of the Surrogate's Court that in order to make a complete and equitable decree on judicial settlement, such decree may

grant the executor the affirmative relief of directing a legatee to refund an over-payment to him.

¶ 416 Page 1830.

Continuation of subject of allowing parent for past support.

It was, however, held in a recent case that:

“On the death of a husband, the widow owes her infant children the duty to bring them up and educate them; but, when it is necessary to pay out money for their support and education, she may be allowed to make such disbursements from the funds of the infants before resorting to her own, and this rule is not changed by the Domestic Relations Law.” *Welch v. Welch*, 200 N. Y. Supp. 652.

¶ 417 Page 1833.

Continuation of subject of prosecuting action for negligence.

The executor or administrator is not only a nominal party charged with the duty to prosecute the action as a trustee for the beneficiaries, but he is a necessary party. In case of the death of the executor or administrator his successor must be appointed and the action revived and continued in the name of the successor.

Crouse v. N. Y. State Rys., 124 Misc. Rep. 780,
209 N. Y. Supp. 264.

Braxton v. Setkovitz, 205 App. Div. 652, 200 N.
Y. Supp. 118.

Hegerich v. Keddie, 99 N. Y. 258.

Matter of Meekin, 164 N. Y. 145.

Kelliher v. N. Y. C. R. Co., 212 N. Y. 207.

Hamilton v. Erie R. Co., 219 N. Y. 343.

Page 1836.

Continuation of subject of effect of settlement and release of cause of action for negligence.

Where the executor brings an action for damages for negligent killing, and has agreed upon a contingent fee

with his attorney, he may continue the action for the benefit of his attorney and to relieve the estate from costs, even though the sole beneficiary of the damages has released the cause of action. The judgment should be for the value of the services of the attorney and for costs. *Davis v. N. Y. Cent. & H. R. R. Co.*, 233 N. Y. 242. Followed 237 N. Y. 375.

¶ 420 Page 1845.

Continuation of subject of trial of claim of representative against the deceased.

On the trial of such a claim there is no right to a trial with jury, as the statute requires it to be proved to and allowed by the surrogate. *Matter of Beare*, 122 Misc. Rep. 519, 203 N. Y. Supp. 483.

¶ 427 Page 1865.

Continuation of subject of proving title to deposit in the name of one person in trust for another.

The rule in the case of *Matter of Totten*, 179 N. Y. 112, was reaffirmed in the case of *Morris v. Sheehan*, 234 N. Y. 366, where it was held that a deposit by one person in trust for another was presumptively the money of the person for whom it was deposited as it existed at the death of the depositor, but that such presumption could be rebutted. Apparently then the statement in sub. 3 of § 249, Banking Law does not apply to such a case. That the presumption could be contradicted by evidence of the circumstances under which the deposit was made was implied in the decision of *Tierney v. Fitzpatrick*, 195 N. Y. 433.

This provision that the form of the deposit shall be conclusive evidence of the title in the survivor was held in *Heiner v. Greenwich S. B.*, 118 Misc. Rep. 326, 193 N. Y. Supp. 291, not to be unconstitutional as taking property without due process of law. The decision was based on the

right of one of the parties to establish the ownership of the property during life, and therefore was a statute of limitation, citing *People v. Turner*, 117 N. Y. 227. Although the justice found that the joint account was established for convenience only, he held that the form of the account was conclusive.

Deposit in savings bank in name of depositor in trust for another remaining unchanged at his death is a presumptive trust, but it may be overcome by proof. *Morris v. Sheehan & Co.*, 234 N. Y. 366.

Page 1866.

Continuation of subject of joint deposits in savings banks and their effects.

This subject was carefully examined by the appellate division, third department, in *Matter of Fonda*, 206 App. Div. 61, 200 N. Y. Supp. 881, where the pass book, as finally changed at the request of the depositor, read "E. T. F. or M. P. B., Pay to either or the survivor." Evidence was received and considered as to the transactions of the depositor with the bank when two changes in the character of the deposit were made, and the court said:

"There was no proof, therefore, that E. T. F. intended to make an immediate gift; whereas, on the contrary, all the proof indicated that she intended to make a gift which would take effect only after her death. The statute (§ 249 Banking Law) was, therefore, ineffective, and the attempted gift, under common law principles failed."

In discussing the case the court said that section 249, Banking Law, modified the common law rules in relation to gifts, as they applied to bank accounts, and no symbolic delivery of the gift was necessary, and when the deposit is in the exact or substantially the exact form required by the statute a presumption was raised of an intent to make an immediate gift.

In order to make this statute applicable and a presumption of joint tenancy the deposit must be in the form specific-

ally mentioned in the statute. *Hayes v. Claessens*, 189 App. Div. 449, 179 N. Y. Supp. 153, 234 N. Y. 230; *McDonald v. Sargent*, 121 Misc. Rep. 437, 201 N. Y. Supp. 129; *Matter of Kimball*, 124 Misc. Rep. 181, 207 N. Y. Supp. 757.

Page 1870.

Addition to subject of transfer tax on estates by entirety.

Tenancy by entirety. See ¶ 93.

Where the amendments to § 220 of the Tax Law made in 1915 and 1916 apply, the property passes as though the husband were the absolute owner free from his wife, and the appraiser should deduct the dower of the widow. *Matter of Dunn*, 118 Misc. Rep. 426, 193 N. Y. Supp. 919.

This case was affirmed, 205 App. Div. 407, 199 N. Y. Supp. 673, but was reversed in the court of appeals, 236 N. Y. 461, and now it seems to be settled that in such a case the widow is not entitled to a deduction of the value of her dower.

Only one-half taxable.

Under an amendment to subd. 7, sec 220, made in 1924, one-half of the value of property held in entirety is now taxable. See ¶ 93, Supplement.

¶ 429 Page 1873.

Continuation of subject of proving claim for additional services under general hiring contract.

Implied contract under general hiring.

The inference of an implied contract to pay the reasonable value of services rendered, which may arise from the mere rendition and acceptance of the service, cannot be drawn, where, because of the relationship of the parties, it is natural that such service should be rendered without

expectation of pay. *Fox v. Artic Placer Mining & Milling Co.*, 229 N. Y. 124. Accordingly a salaried employee cannot ordinarily recover, in addition to his salary, the reasonable value of services rendered which fall outside the scope of duties of his employment, unless such services are so distinct from the duties of his employment and of such nature that it would be unreasonable for the employer to assume that they were rendered without expectation of further pay. *Robinson v. Munn*, 238 N. Y. 40, revg. 206 App. Div. 506, 201 N. Y. Supp. 655; *Reilly v. Burkelman*, 149 App. Div. 549, 134 N. Y. Supp. 13.

¶ 431 Page 1878.

Continuation of subject as to competency of witness as to personal transaction, § 347, C. P. A.

A physician suing to recover for services as an expert witness can not testify that the deceased came to his office in company with her husband and that prior thereto he had conferred with her attorney. *Manson v. Wright*, 205 App. Div. 294, 199 N. Y. Supp. 459.

Plaintiff, suing to enforce performance of contract, which he made for benefit of third persons, and demanding nothing for himself, and who would not be liable to decedent or his estate if it were not carried out, is not a "person interested in the event," within Civil Practice Act, § 347. *Crocker v. N. Y. Trust Co.*, 123 Misc. Rep. 460, 205 N. Y. Supp. 761, 238 N. Y. 593.

Page 1881.

Claim paid.

It is well settled that when an executor or administrator has paid a claim and the same is objected to on his accounting proceedings, and he is sought to be surcharged with said payment, he cannot testify in his own behalf in regard to

transactions with the deceased affecting said claim, for the reason that in such a case he is a "person interested in the event," for, if the objections of the contestants in such a case are upheld, then the executor or administrator must personally reimburse the estate for the claim so paid by him. But even in such a case, it is held that the executor or administrator may call as a witness in his behalf the payee of such claim, on the theory that in such a proceeding the payee is not a "person interested in the event."

Matter of Smith, 153 N. Y. 124.

Matter of Goss, 98 App. Div. 489, 90 N. Y. Supp. 760;

Matter of Mulligan, 82 Misc. Rep. 336, 143 N. Y. Supp. 686, *affd.* without opinion 165 App. Div. 912, 150 N. Y. Supp. 1098, *affd.* without opinion 216 N. Y. 720.

Matter of Knibbs, 108 App. Div. 134, 96 N. Y. Supp. 40.

Matter of Sase, 176 App. Div. 744, 163 N. Y. Supp. 1014.

Matter of Fitzpatrick, 123 Misc. Rep. 770, 206 N. Y. Supp. 496.

Claim allowed, but not paid.

Where a claim has been allowed, but not paid, and the matter comes before the surrogate, the surrogate is limited in his consideration of the question of whether the claim was allowed fraudulently or negligently; and if his decision should be in favor of the contestant, then the only effect of the same is that the claim "shall be deemed to be rejected by the accountant at the time of such determination." Surrogate's Court Act, § 210; *Matter of Dorland*, 100 Misc. Rep. 236, 245, 246, 166 N. Y. Supp. 616. As a result of such a proceeding, the executor or administrator would not become personally liable to the claimant, for the

reason that the claimant would then stand in the same position as though his claim had been rejected by the executor or administrator, and he would have his proper remedy by suit to establish his claim against the estate. For these reasons, it would seem clear that in such a proceeding as mentioned above, an executor or administrator would not be a "person interested in the event," so as to prohibit him from testifying as to the facts which were ascertained and known to him before allowing the claim. Such a case is clearly distinguishable from one in which the executor or administrator has paid a claim and the contestants seek to surcharge him with the amount so paid. In the latter case the representative is clearly a "person interested in the event" and prohibited from testifying in his own behalf. *Matter of Fitzpatrick*, 123 Misc. Rep. 779, 206 N. Y. Supp. 496.

¶ 432 Page 1883.

Continuation of subject of proof of claims for services.

Mr. Surrogate Schulz has very clearly stated the present rule as to sufficiency and character of proof in *Matter of Sullivan*, 118 Misc. Rep. 58, 192 N. Y. Supp. 318:

"If the decedent and the petitioner had not been related, then, upon proof that the board and lodging was furnished, the law would imply an obligation on the part of the decedent to pay for the same. *Van Kuren v. Saxton*, 3 Hun, 547, 5 Thompson & C. 566; *Gallaher v. Vought*, 8 Hun, 87; *Williams v. Hutchinson*, 3 N. Y. 312. Such implication, however, does not arise in this matter by reason of the fact that they were sisters. *Collyer v. Collyer*, 113 N. Y. 442; *Matter of Dole*, 168 App. Div. 253, 153 N. Y. Supp. 895; *Matter of Babcock* (Sur.), 169 N. Y. Supp. 800, affirmed no opinion (Sup.), 171 N. Y. Supp. 1078, and cases cited; *Matter of Furniss*, 86 App. Div. 96, 83 N. Y. Supp. 530. Hence no support for the claim is received from that source, and whatever finding is made must rest entirely upon the testimony of the witnesses.

Although the relationship existing between the parties voids the implication of an agreement to pay, that fact alone does not preclude the possibility of any recovery, if it is shown that it was in the minds of the parties that compensation should be made therefor and that an agreement to that effect existed. *Darde v. Conklin*, 73 App. Div. 590, 77 N. Y. Supp. 39.

It is well established that claims of this character, asserted after the death of an alleged debtor, must be carefully scrutinized, and, while the language of the opinions of the many cases on the subject varies, the consensus of opinion is that the evidence to establish them should be clear, convincing, and satisfactory, in order that fraud against the estates of the dead may be prevented. *Kearney v. McKeon*, 85 N. Y. 136; *Van Slooten v. Wheeler*, 140 N. Y. 624; *Hamlin v. Stevens*, 177 N. Y. 39; *Rosseau v. Rouss*, 180 N. Y. 116.

For a time some uncertainty had arisen as to the amount and kind of proof required to establish such claims; but this has been dispelled since the decisions in *McKeon v. Van Slyck*, 223 N. Y. 392; *Ward v. New York Life Insurance Co.*, 225 N. Y. 314; and *Matter of Sherman*, 227 N. Y. 350, in which it was held that such claims need be established only by a fair preponderance of the evidence, and not necessarily by written evidence.

Again, doubt arose as to whether the principles enunciated by the earlier decisions heretofore cited had been entirely disapproved of by those last above referred to. Happily the matter is settled, so far as this court is concerned, by the opinion in *Frisbie v. Lucas*, 192 App. Div. 583, 589, 183 N. Y. Supp. 308, in which Mr. Justice Page expressed the opinion that the Court of Appeals did not intend to alter the principles or policy of the earlier decisions, but only to correct errors in their application. Before a fair preponderance can be said to exist, the evidence should be clear and convincing, bearing in mind that one of the parties to the alleged transaction is dead. *Matter of People's Trust Co.*, 79 Misc. Rep. 595, 141 N. Y. Supp. 201.'

¶ 434 Page 1888.

Addition to subject "Proof of notes and checks as a debt."

Where the execution of notes made by decedent has been established, the mere production of them by claimant to whom they were made payable establishes that he has title thereto, and that they were delivered to him for a valuable consideration, and it is unnecessary to show by oral testimony his right of possession thereto. Such notes are not inadmissible by virtue of any of the provisions of Section 347, Civil Practice Act. *Matter of Bougher*, 119 Misc. 476.

¶ 446 Page 1914.

Continuation of subject of when an after-born child is or is not provided for by a will.

The fundamental object of this section, as declared by

Chief Judge Hiscock in *McLean v. McLean*, 207 N. Y. 365, at page 371, "is to guard and provide against such testamentary thoughtlessness and lack of vision as prevent a testator from contemplating the possibility of after-born children and taking such possibility into account in framing a scheme for the testamentary disposition of his property." Again, in *Tavshanjian v. Abbott*, 200 N. Y. 374, Judge Gray stated: "It was intended to provide a rule, by which an intent to disinherit must appear from the will itself."

An instruction of caution is also imposed in *Tavshanjian v. Abbott*, *supra*, that, if there is any "doubt as to the construction to be given to this will, it should be resolved in favor of the testator's children, upon the soundest principles of justice." The remoteness and uncertainty of the vesting of the gifts for the after-born child are not relevant. So long as the latter is mentioned or provided for in any way the requirements of the statute are satisfied.

Where a father made his will several years before the birth of a son, but after said son was born bought insurance for the benefit of the son, the insurance was held to be a provision for the son which prevented his taking the interest in the estate specified in the statute. *Matter Brant*, 121 Misc. Rep. 102, 201 N. Y. Supp. 60.

Failure to provide must appear.

It sufficiently appears from the will that an after born child is mentioned in the will when the will states that in the event of leaving issue the testator bequeaths and devises the entire estate to his widow, and in such a case such child is not entitled to share in the estate. *Matter of Dick*, 117 Misc. Rep. 635, 191 N. Y. Supp. 762, 194 N. Y. Supp. 841.

After-born child no intestate interest.

Holbrook v. Holbrook, 193 App. Div. 286, 183 N. Y. Supp. 728, *affd.* 230 N. Y. 600.

Wormser v. Croce, 120 App. Div. 287, 104 N. Y. Supp. 1090.

Matter of Mulqueen, 208 N. Y. Supp. 521.

McLean v. McLean, 207 N. Y. 372.

After-born child has intestate interest.

Stachelberg v. Stachelberg, 124 App. Div. 232, 108 N. Y. Supp. 645, *affd.* 192 N. Y. 576.

Tavshanjian v. Abbott, 200 N. Y. 374.

Crocker v. Mulligan, 154 App. Div. 711, 139 N. Y. Supp. 381, 193 App. Div. 291, 183 N. Y. Supp. 731, 208 N. Y. Supp. 522.

¶ 450 Page 1929.

Estates of Onondaga Indians.

The "dead feast" according to custom of the Onondaga Indians has never been fully recognized by our law as having a legal existence in dividing the property of a deceased Indian, although it has sometimes been given effect. *Hatch v. Luckman*, 155 App. Div. 765, 118 N. Y. Supp. 689, 140 N. Y. Supp. 1123; *George v. Pierce* 85 Misc. Rep. 103, 148 N. Y. Supp. 230; *Crounse v. N. Y. State Rys.*, 124 Misc. Rep. 780, 209 N. Y. Supp. 264.

Sec. 104, Dec. Est. Law, amended by making sec. 314, Sur. Ct. Act, applicable to certain sections of Decedents Estate Law.

§ 104. Application of certain sections in this article.

Section three hundred and fourteen of the surrogate's court act is applicable to the provisions of section ninety-eight to one hundred, both inclusive, and section one hundred and three, of this chapter. (Added by Laws 1909, ch. 240, and amended by Laws 1924, ch. 105, § 1. In effect April 3, 1924.)

¶ 453 Page 1936.

Explanation.

What is there said as to descendants of uncles and aunts

sharing on distribution by representation must be understood as applying under the conditions of the law from 1898 to 1905, as shown by the heading of the subject and not to the law as it existed after the last date and as it now exists.

¶ 454 *Page 1936.*

Section 104, Dec. Est. L., amended by making sec. 314 Sur. Ct. A., being section of definitions, applicable to this section and to sec. 103 following.

¶ 455 *Page 1937.*

Continuation of subject "Distribution where either husband or wife is divorced."

In cases where the wife secures a divorce from the husband she retains her property rights. Civ. Prac. Act, § 1156. Where the husband is plaintiff he retains his property rights in the real and personal property of the wife which he has when the judgment is rendered, and the wife loses her rights as doweress and as a widow. Civ. Prac. Act, § 1158.

¶ 456 *Page 1939.*

For Amendments to the Domestic Relations Law, regarding void and voidable marriages, See ¶ 23 of this Supplement.

Addition to subject of distribution to child where marriage of parents has been annulled.

Where a child is born before the marriage of its parents, and they are then married and afterwards the marriage is annulled for fraud and duress, the child does not share as a distributee.

Where such marriage is annulled the statute says it is void from the date of the decree, but that means that such decree relates back to the date of the attempted marriage

and establishes, from the date of the decree, that the marriage never existed. *Matter of Moncrief*, 235 N. Y. 390. Explained 207 App. Div. 240, 202 N. Y. Supp. 98.

¶ 457 Page 1940.

Continuation of subject "Property rights of adopted children."

The cases seem to make a distinction between the rights of adopted children under sec. 114, Domestic Relations Law, and their rights when construing a will. In the latter cases the test which has been applied is not the status of the adopted child at law, but how such child is treated in the nomenclature or vocabulary of the testator, the intent of the testator as gathered from the whole will. Such cases as *U. S. Trust Co. v. Hoyt*, 150 App. Div. 621, 135 N. Y. Supp. 849; *N. Y. Life Ins. & Trust Co. v. Viele*, 161 N. Y. 11; *Matter of Leask*, 197 N. Y. 193, are cases construing wills, and hold that the adopted child can not take.

In the following cases, phrases in other statutes, such as lineal descendants (*In re Cook's Estate*, 187 N. Y. 253; *Matter of Hoyt*, N. Y. Law Journal, November 22, 1918, affirmed 187 App. Div. 951, 175 N. Y. Supp. 906); child or children (*Bourne v. Dorney*, 184 App. Div. 476, 171 N. Y. Supp. 264, affirmed 227 N. Y. 641; *Matter of Foster's Estate*, 108 Misc. Rep. 604, 177 N. Y. Supp. 827); heirs at law or next of kin (*Theobald v. Smith*, 103 App. Div. 200, 92 N. Y. Supp. 1019; *United States Trust Co. of New York v. Hoyt*, 150 App. Div. 621, 135 N. Y. Supp. 849; *United States Trust Co. of New York v. Hoyt*, 115 Misc. Rep. 663, 190 N. Y. Supp. 166, affirmed 173 App. Div. 930, 158 N. Y. Supp. 1133, affirmed 223 N. Y. 616; *Matter of Hoyt*, N. Y. Law Journal, December 12, 1916, affirmed *Matter of United States Trust Co. of New York*, 179 App. Div. 923, 166 N. Y. Supp. 923; affirmed 223 N. Y. 617, were held to include an adopted child. Likewise the rights of adopted children have been recognized, where the testator used language in

a will or deed of trust having a statutory definition, such as heirs or next of kin (*Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127); *Dodin v. Dodin*, 16 App. Div. 42, 44 N. Y. Supp. 800, affirmed 162 N. Y. 635. But these cases all involve statutory construction, and not the ascertainment of the intent of a testator. *Matter of Hoyt*, 120 Misc. Rep. 188, 197 N. Y. Supp. 828.

¶ 469 Page 1963.

Continuation of subject of obtaining share of unknown person paid into the state treasury.

On such an application the surrogate may determine the method of trial, and a party has no absolute right to a trial with jury. *Matter of Thompson*, 204 App. Div. 182, 198 N. Y. Supp. 374, 202 N. Y. Supp. 45.

¶ 472 Page 1969.

Amendment to sec. 271 Sur. Ct. Act, relating to payment of shares of infants including proceeds of action.

§ 271. Payment of share of infant.

When a legacy or distributive share or the proceeds of any action brought as prescribed in section one hundred and thirty of the decedent estate law or the proceeds of a settlement of a cause of action brought in behalf of an infant for personal injuries is payable to an infant, the decree or order shall direct that it be paid to his guardian upon his filing sufficient security, unless the sum payable to the infant does not exceed one hundred and fifty dollars, in which case the decree or order may order it to be paid to his father, or to his mother, or to some competent person with whom the infant resides, or who has some interest in his welfare, for the use and benefit of such infant. If there be no guardian, the decree or order shall provide that the sum payable to the infant not disposed of in the manner aforesaid, shall be paid into or deposited with the surrogate's court. (Amended by Laws 1922, ch. 151. In effect Sept. 1, 1922.)

Amendment to Civil Practice Act, concerning payment of recovery in negligence action in behalf of infant.

Disposition of proceeds of infant's cause of action for personal injuries.

When the proceeds of a cause of action of an infant for personal injuries, after deducting the payment of attorneys' fees and expenses allowed by the court, do not exceed one hundred and fifty dollars, the court may order such proceeds paid to his father, or to his mother, or to some competent person with whom the infant resides, or who has some interest in his welfare, for the use and benefit of such infant. (Added to Art. 61 by Laws 1925, ch. 242, § 1. In effect April 1, 1925.) § 980-a Civ. Prac. Act.

¶ 476 Page 1980.

Amendment to sec. 314 Sur. Ct. Act, defining words and expressions.

§ 3. Subdivisions two and three of section three hundred and fourteen of such act are hereby amended to read as follows:

2. The word "assets" signifies personal property applicable to the payment of the debts and funeral expenses of a decedent.

3. The word "debts" includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action; the word "creditor" includes every person having such a claim or demand, any person having a claim for expense of administration, or any person having a claim for funeral expenses; and the expression "funeral expenses" includes suitable church or other services, a burial lot and suitable monumental work erected thereon, and a reasonable charge or expenditure for the perpetual care of the decedent's burial lot. (Amended by Laws 1922, ch. 129. In effect Sept. 1, 1922.)

Page 1982.

Technical amendment to sec. 316 Sur. Ct. Act.

§ 316. Certain provisions made applicable to proceedings in surrogate's courts.

Except where a contrary intent is expressed in, or plainly implied from the context of *this act*, a provision of law or of rules, applicable to practice or procedure in the supreme court, applies to surrogate's courts and to the proceedings therein, so far as they can be applied to the substance and subject matter of a proceeding without regard to its form. (Amended by Laws 1922, ch. 653, § 1. In effect April 13, 1922.)

¶ 477 Page 1985.

Additional words and phrases construed.

“Authorize and empower” used in relation to appointing another trustee. *Matter of Merritt*, 124 Misc. Rep. 709, 209 N. Y. Supp. 243.

Page 1989.

“Heirs” construed as to taking remainder estate. *Matter of Turner*, 206 App. Div. 294, 200 N. Y. Supp. 476; modified 201 N. Y. Supp. 958, *affd.* 239 N. Y. 83.

Page 1992.

“May” construed as “must” when public rights are involved, but is permissive when used in connection with enforcement of private rights. *Matter of Thompson*, 204 App. Div. 182, 198 N. Y. Supp. 374, 202 N. Y. Supp. 45.

Page 1993.

“Or,” “and.”

In savings bank deposits the same rule applies no matter which word is used. *Matter of Meehan*, 59 App. Div. 156, 69 N. Y. Supp. 9; *Matter of Larmon*, 208 N. Y. Supp. 491.

Page 1995.

“Relatives.”

Held not to include a wife, especially where in the will she is given substantial bequests. *Matter of Sobel*, 117 Misc. Rep. 508, 191 N. Y. Supp. 676.

Page 1997.

“Widow.”

Is not included in the term “relatives” especially where the will contains a substantial bequest to her. *Matter of Sobel*, 117 Misc. Rep. 508, 191 N. Y. Supp. 676.

FORMS

INDEX TO NEW FORMS

ADOPTION PROCEEDINGS:	Form No.
petition for confirmation of adoption.....	334
agreement of adoption.....	334 a
order appointing referee to investigate.....	334 b
report of referee.....	334 c
order confirming adoption.....	334 d
AGREEMENT:	
for adoption of infant.....	334 a
for sale to pay debts.....	331 e
CITATION:	
sale of real estate to pay debts.....	331 b
CONSTRUCTION OF WILL:	
petition	335
citation	335 a
decree	335 b
DESIGNATION:	
of clerk to receive service on trustee.....	333
ISSUES:	
questions for submission.....	332
MORTGAGE, LEASE OR SALE TO PAY DEBTS, ETC.:	
petition by administrator before one year.....	331
order to publish citation.....	331 a
citation	331 b
order to sell.....	331 c
agreement to purchase.....	331 e
report by administrator.....	331 d
order to convey.....	331 f
mortgage of real estate to pay debts.....	331 g
Order, withdrawal securities.....	330 a
Petition, withdrawal securities.....	330
Receipt, withdrawal securities.	330b

ADDITIONAL INDEX TO NEW FORMS

FORM No. 330.

Petition to withdraw securities from depository who holds same under order
reducing penalty of bond.

SURROGATE'S COURT, Rensselaer County.

In the matter of the unexecuted trust for.....
under the last will and testament of.....
deceased.

To the Surrogate's Court of Rensselaer County:

The petition of, residing at Salem, in the County of Washington, New York, respectfully shows:

First. That by an order of this Court, made on the 25th of July, 1913, and recorded on the fifth day of August, 1913, in Book 231 of the Records of the Rensselaer County Surrogate's Court, at page 469, your petitioner was duly appointed substituted trustee under the will of....., deceased, to execute an unexecuted trust for the benefit of your petitioner and others.

That the husband of your petitioner still survives and that said trust is not completely executed.

Second. That in by the terms or said order appointing your petitioner as such substituted trustee certain securities, namely, one bond and mortgage executed by and wife to secure the principal sum of five hundred (\$500) dollars and one bond and mortgage executed by the same persons to secure the principal sum of eleven hundred (\$1,100) dollars were directed to be deposited with the Troy Trust Company, of Troy, New York, as depository, in order that the penalty of the bond to be given by your petitioner as such substituted trustee might be reduced, and thereupon your petitioner gave a bond for the sum of thirty-five hundred (\$3,500) dollars in pursuance of the terms of such order, and the said two bonds and mortgages were deposited with the said Troy Trust Company, of Troy, New York, where they now remain.

Third. That the said..... is now desirous of paying the principal of said two mortgages and desires to obtain a proper release and satisfaction thereof.

Fourth. That the only persons interested in this application are your peti-

tioner and her children who may be the legatees of the trust fund represented by said bonds and mortgages under certain contingencies, who are as follows:

.....

 all of whom are over the age of twenty-one years.

Wherefore, your petitioner prays for an order of this Court fixing the amount of any additional bond which may be required of her as such substituted trustee and directing the said Troy Trust Company, of Troy, New York, to deliver to your petitioner the said two bonds and mortgages and all papers held by them in connection therewith, and that the said Troy Trust Company upon such delivery be released and discharged from any and all liability concerning the same.

Dated Salem, New York, October....., 1921.

.....
 As substituted trustee under the
 will of.....

(Verification.)

FORM No. 330a.

Order to release security.

At a Surrogate's Court held in and for the County of Rensselaer, at the Court House in the City of Troy, New York, on theday of December, 1921.

Present: Hon. Chester G. Wager, Surrogate.

STATE OF NEW YORK—Rensselaer County.

In the matter of the unexecuted trust for.....
 under the last will and testament of.....,
 deceased.

An order of this Court having been heretofore on the 25th day of July, 1913, made appointing..... substituted trustee under the last will and testament of....., deceased, to execute an unexecuted trust created by said will; and,

In and by the terms of said order appointing such trustee it was directed that a portion of the trust estate, namely, one bond and mortgage executed by..... and wife to secure the principal sum of five hundred (\$500.00) dollars and one bond and mortgage executed by the same persons to secure the principal sum of eleven hundred (\$1,100.00) dollars, be deposited with

The Troy Trust Company, of Troy, New York, as depositary, and the penalty of the bond which would have been required from the said substituted trustee being reduced; and,

It appearing by the petition of the said....., filed in this Court, that the said mortgagor is desirous of paying the principal of said two mortgages which are now in the possession and control of the said The Troy Trust Company, but without authority to receive payment of the principal thereof or to execute a proper discharge thereof.

Now, therefore, on reading and filing the petition of the said..... setting forth the facts and praying that the said The Troy Trust Company may be authorized and directed to turn over to her as such substituted trustee the said two bonds and mortgages and all papers and documents connected therewith upon her giving an additional bond as such substituted trustee; and

There having been filed in this Court in connection with said petition the waivers of issue and service of citation upon this application executed by all of the children of said....., all of whom are now alleged in said petition to be of full age, they being the only persons interested in the principal of said trust fund; and

The said Surrogate having fixed the penalty of the additional bond, to be given by the said substituted trustee, to entitle her to receive possession of said bonds and mortgages and to administer upon them as a part of said trust fund, at the penal sum of two thousand (\$2,000) dollars; and

The said.....having filed in this Court an additional bond, as such substituted trustee, in the penalty of two thousand (\$2,000) dollars, which bond is approved; and

On motion of Heaton & Mambert, Esqs., attorneys for said petitioner, it is

Ordered, that The Troy Trust Company, the depositary of the said two mortgages and the papers and documents connected therewith, turn over and transfer to the said..... as such substituted trustee, the said two bonds and mortgages and papers and documents connected therewith, and that upon filing the receipt of the said substituted trustee for said bonds and mortgages, papers and documents connected therewith and a discharge of the said The Troy Trust Company by the said substituted trustee, the said The Troy Trust Company be discharged from any and all past or further liabilities or obligations on account, and under the order heretofore made designating it as depositary and from and on account of all its transactions regarding the subject matter hereof since said designation; and

It is further ordered, that the said....., as such substituted trustee, be authorized to administer the said two bonds and mortgages hereafter as a part of the said trust estate.

And it is further ordered, that said substituted trustee pay from the principal of said trust fund the additional fees of the said The Troy Trust Company as such depositary, hereby fixed at.....dollars, and that she be allowed from said principal.....dollars, the expenses of this proceeding.

.....
Surrogate.

FORM No. 330b.

Receipt for released security.

STATE OF NEW YORK, Rensselaer County.

In the matter of the unexecuted trust for.....
 under the last will and testament of.....,
 deceased.

Salem, New York, November , 1921.

Received from The Troy Trust Company two bonds and mortgages made by....., one for five hundred (\$500.00) dollars and one for eleven hundred (\$1,100.00) dollars, together with all papers connected with the same, which bonds and mortgages were ordered by the Surrogate of the County of Rensselaer to be deposited with the said The Troy Trust Company as depositary, and which by an order of the said Court made on the.....day of November, 1921, were authorized to be delivered to me as substituted trustee of the unexecuted trust under the last will and testament of....., deceased; and I further release and discharge the said The Troy Trust Company, of Troy, New York, from any and all past or further liability or obligation on account of said bonds and mortgages so deposited as aforesaid.

Witness my hand and seal this.....day of November, 1921.

.....
 As substituted trustee under the last will and testament
 of

(Acknowledgment.)

FORM No. 331.

Petition for mortgage, lease or sale of real estate by administrator before
 expiration of publication of notice to creditors.

STATE OF NEW YORK

SURROGATE'S COURT, County of Onondaga.

in the matter of the petition of.....for the
 mortgage, lease or sale of the real property of
, late of Baldwinsville, Onondaga
 County, New York, deceased, for the purpose of
 paying her debts and funeral expenses.

To the Surrogate's Court of the County of Onondaga:

The petition ofrespectfully shows to the Court:

I. That.....died intestate at the village of Baldwinsville, Onondaga
 County, New York, on the tenth day of February, 1923, and letters of ad-

ministration of the goods, chattels and credits of said decedent were thereafter and on October twenty-ninth, 1923, issued to your petitioner by the Surrogate's Court of the County of Onondaga, and he duly qualified and is now acting as such administrator.

II. That the personal property left by decedent amounts to \$125.00 and consists of \$25.00 in bank and \$100.00 in household furniture, which is insufficient for the payment of her debts, funeral expenses, just demands and charges against the same. No inventory has been made or filed.

III. That said decedent left no other personal property.

IV. That the funeral expenses, debts, just demands and charges against said decedent, to the best of your petitioner's knowledge, information and belief, amount to \$1,486.47, the items of which are particularly set forth in schedule "A," hereto annexed, which is made a part of this petition.

V. That said decedent died seized and possessed of real property situated in said village of Baldwinsville, County of Onondaga and State of New York, bounded and described as follows: (Insert description.)

Said real property came to the decedent by inheritance from her mother, who devised the same to her by her last will and testament duly probated. That said real property, together with the buildings and appurtenances belonging thereto, is the only real property owned by the decedent at the time of her death and is of the value of about \$2,000.00, as your petitioner is informed and believes.

VI. That said real property is subject to a mortgage held by..... in the sum of \$100.00 and interest at six per cent. and unpaid village, town and school taxes.

VII. That the above-described real property has not been aliened or encumbered by the heirs at law of said decedent.

VIII. That said real property is now and has been since the death of decedent occupied by....., a tenant, and he has paid no rent for said premises; that the rent of the same is \$14.00 per month.

IX. That the names, post-office addresses and relationship of all the persons interested in this proceeding, who are required to be cited upon this application or concerning whom the Court is required to have information, as far as they can be ascertained with due diligence, are as follows:

Next of kin and heirs at law:

Name.	Relationship.	Address.
Alice H. Williams.	maternal first cousin.	620 Third avenue, Troy (No.) N. Y.
.....
.....
.....

(The last four persons above named are chillren of....., maternal first cousin, who died subsequent to the death of decedent and on April tenth, 1923.)

.....

.....

.....

(The last six above-named persons are the children of....., an uncle of decedent, who predeceased her.)

Creditors of decedent:

Name of creditor.

Address.

.....

.....

.....

John Doe, a creditor (the name John Doe is fictitious and is intended to represent all unknown creditors as a class, who have claims against the said decedent and whose names and post-office addresses are unknown to your petitioner).

That none of the above-named persons is an infant or incompetent person, to the best of your petitioner's knowledge, information and belief.

X. That there are no persons, other than those mentioned herein interested in this proceeding.

XI. That a notice to all persons having claims against the estate of said decedent is being published, pursuant to an order of the Surrogate's Court of the County of Onondaga, and that said publication has not yet expired.

Wherefore, your petitioner prays that a citation may issue herein, citing and requiring all persons interested in the real estate of said decedent, or in any questions raised with reference to the sale of said real property, to show cause why the said real property should not be sold for the purpose of paying the decedent's debts, funeral expenses, just demands and charges against her, and why an order should not be made directing your petitioner, as administrator of the estate of said decedent, to enter into possession of said real property and to control the same and receive the rents thereof, due and unpaid, and which may become due pending the mortgage, lease or sale of said real property under the order and direction of this Court.

Dated Baldwinsville, N. Y., February....., 1924.

.....
Petitioner.

STATE OF NEW YORK,
County of Onondaga, ss.:

....., being duly sworn, says that he is the petitioner named in the foregoing petition by him subscribed; that he has read said petition and knows the contents thereof, and that the same is true of his own knowledge,

except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this.....

day of February, 1924.

Notary Public,

Onondaga County, N. Y.

SCHEDULE "A."

....., funeral expenses.....	\$200.00
....., plumbing.....	89.00

FORM No. 331a.

Order for publication of citation on sale of real estate by administrator before expiration of publication of notice to creditors.

At a Surrogate's Court held in and for the County of Onondaga,
at the Surrogate's Office, in the City of Syracuse, in said
County, on theday of February, 1924.

Present: Hon. John W. Sadler, Surrogate.

STATE OF NEW YORK,

SURROGATE'S COURT, County of Onondaga.

In the matter of the petition of..... for the
mortgage, lease or sale of the real property of
....., late of Baldwinsville, Onondaga
County, New York, deceased, for the purpose of
paying her debts and funeral expenses.

On reading and filing the petition, duly verified, of....., administrator of the goods, chattels and credits of said....., late of the village of Baldwinsville, in said County, deceased, praying that a citation may issue out of this Court directed to the heirs at law, next of kin, creditors and all persons interested in the estate of said deceased, to show cause why the real property of said deceased should not be sold for the purpose of paying her debts, funeral expenses, just demands and charges against her, and why an order should not be made directing the petitioner in this proceeding, as administrator of the estate of said deceased, to enter into possession of said real property and to control the same and receive the rents thereof, due and unpaid and which may become due pending the mortgage, lease or sale of said real property under the order and direction of this Court; and it appear-

ing satisfactorily to the Surrogate that the following named persons are persons interested in the estate of said decedent, and that they severally reside out of the State of New York, at the following named places, to wit :

Name.	Address.
Mae Byers.....	8 West Webster St., Grandville, Mich.
Lulu D. Dougherty.....	Delta, Colorado.
Mrs. Lambert Nemyer.....	Grandville, Mich.
Seymour A. Torrey.....	610 Twelfth Ave., Rock Island, Ill.
George A. Winnie.....	Cocoa, Fla.
Minnie L. Stagner.....	Route No. 1, Box 313, Santiago, Calif.
Eva Jane Layloud.....	701 Wilson St., Bay City, Mich.
Marion Ricker.....	54 Detroit Street, Hammond, Indiana.

And it further appearing satisfactorily to the Surrogate that there may be unknown creditors of said deceased whose names and post-office addresses are unknown to the petitioner and who have been designated in the petition herein as a class, as follows: John Doe, a creditor (the name John Doe is fictitious and is intended to represent all unknown creditors as a class, who have claims against the said decedent and whose names and post-office addresses are unknown to your petitioner).

And the Surrogate having issued his citation returnable on the 17th day of March, 1924, at ten o'clock A. M.,

It is Ordered, that the said citation be served on said persons above named by the publication thereof, not less than once in each of four successive weeks in the Baldwinsville Gazette, a newspaper published in the village of Baldwinsville, in said County of Onondaga, and by mailing a copy of said citation to each of said persons by the deposit on or before the day of the first publication, in the Baldwinsville post-office, of a copy of said citation, contained in a securely closed post-paid wrapper, directed to the person to be served, or, at the option of the petitioner, by delivering a copy of the citation without the State to each of the persons so named or described in the petition and citation, and who live without the State, but in the United States, in person, at least twenty days before the return day thereof, and on those residing without the United States, at least thirty days before the return day thereof.

And it appearing to the satisfaction of the Surrogate from the petition in this matter that the place or places where the said John Doe, a creditor (the name John Doe is fictitious and is intended to represent all unknown creditors as a class who have claims against the said decedent and whose names and post-office addresses are unknown to your petitioner), would receive matter transmitted through the post-office are unknown and cannot with reasonable diligence be ascertained,

It is Ordered, that the deposit of a copy of the citation in the post-office addressed to said John Doe and other unknown creditors be and the same is hereby dispensed with.

.....
Surrogate.

FORM No. 331b.**Citation.**

THE PEOPLE OF THE STATE OF NEW YORK,

To (Insert names of all heirs at law, next of kin, tenants, creditors, and all other persons interested); John Doe, a creditor (the name John Doe is fictitious and is intended to represent all unknown creditors as a class, who have claims against the said decedent and whose names and post-office addresses are unknown to your petitioner).

Upon the petition of....., as administrator, etc., of....., late of the village of Baldwinsville, deceased, who resides at Baldwinsville, New York,

You are hereby cited to show cause before the Surrogate's Court of Onondaga County, at the Court House, in the City of Syracuse, New York, on the 17th day of March, 1924, at ten o'clock in the forenoon of that day, why the real property of said decedent should not be sold for the purpose of paying decedent's debts, funeral expenses, just demands and charges against her, and why an order should not be made directing the petitioner in this proceeding as administrator of the estate of said decedent, to enter into possession of said real property and to control the same and receive the rents thereof, due and unpaid and which may become due pending the mortgage, lease or sale of said real property under the order and direction of the Court.

In Testimony Whereof, we have caused the seal of our said Surrogate's Court to be hereunto affixed.

L. S. Witness: Hon. John W. Sadler, Surrogate of said County,
at the City of Syracuse, this.....day of February,
1924.

.....
Clerk of Surrogate's Court.

FORM No. 331c.**Order for mortgage, lease or sale.**

At a Surrogate's Court held in and for the County of.....,
at the Surrogate's Office in the Court House, at the
of....., on the.....day of....., 19....

Present: Hon....., Surrogate.

STATE OF NEW YORK,

SURROGATE'S COURT, County of

In the matter of the petition of.....for the
mortgage, lease or sale of the real property of
....., late of.....County of.....
New York, deceased, for the purpose of paying
her debts and funeral expenses.

The petition of....., administrator of the goods, chattels and credits
of....., deceased, verified theday of....., 19....,

having heretofore been filed in this Court, praying that a citation issue requiring all persons interested in the real property of said decedent, or in any questions raised with reference to the sale of the said real property, to show cause why said real property should not be sold for the purpose of paying the decedent's debts, funeral expenses, just demands and charges against her, and why an order should not be made directing the petitioner, as administrator of the estate of said decedent, to enter into possession of said real property and to control the same and receive the rents thereof, due and unpaid and which may become due pending the mortgage, lease or sale of said real property under the order and direction of this Court; and a citation having been thereupon issued directed to the heirs at law, next of kin, creditors and all persons interested in the estate of said decedent, pursuant to the prayer of said petition, returnable in this Court on the.....day of, 19....; and said citation having been returned with proof of the due service thereof upon all persons named therein; and the said administrator and petitioner having appeared in person and by....., Esqs., his attorneys, there being no appearance by or on behalf of any other interested parties; and it appearing from said petition that the personal estate owned by the decedent at the time of her death, and now in the possession of said administrator, does not exceed the sum of \$....., and that the funeral expenses, debts, just demands and charges against the estate of said deceased amounts to the sum of \$....., all of which have been admitted by said administrator, and that said personal estate is insufficient for the payment of decedent's debts, funeral expenses and charges; and that said deceased was seized and possessed of real property, situated in the.....of.....County, New York, hereinafter described, of the approximate value of \$....., as appears from the evidence taken before the Court in this proceeding, subject to the payment of a mortgage of \$..... and interest and unpaid village, town and school taxes; and that said real property has not been aliened or encumbered by the heirs at law of said decedent; and it further appearing that said real property is occupied and in the possession of a tenant, who has paid no rent for the same since the death of decedent; and it further appearing that said real property came to the decedent by inheritance from her mother, who devised the same to her by her last will and testament duly probated in this Court, and that said real property descended to the maternal heirs of the decedent, as set forth in the petition herein to the exclusion of the paternal heirs at law; and that no previous application has been made for the relief herein asked for.

Now, on motion of Heaton & Mambert, Esqs., attorneys for the petitioner herein, no one opposing, it is

Ordered, Adjudged and Decreed as follows:

(a) That the personal estate of the decedent is insufficient for the payment of her funeral expenses, debts and just charges against the same amounting in the aggregate to \$....., and that it is necessary that the real prop-

erty owned by the decedent at the time of her death be sold to pay said debts, funeral expenses and charges.

(b) That the administrator of said decedent sell said real property either at public or private sale, and if sold at private sale that he make a written contract of sale with the purchaser thereof and report the same to this Court for its approval and confirmation; if sold at public auction that it be sold to the highest bidder at the sale and that due notice of the time and place of sale be given.

(c) That said real property be sold free and clear of all mortgages against the same and free and clear of all unpaid taxes, water rents and charges which have become fixed liens against the property, and that said mortgages and other liens be paid from the proceeds of sale and discharged.

(d) That before executing this order said administrator execute and file in this Court a bond to the People of the State of New York in the penal sum of \$....., pursuant to the provisions of section 239 of the Surrogate's Court Act.

(e) That said administrator be and he is hereby authorized and empowered to collect the rents of said real property, due and unpaid and which may become due and unpaid previous to the time of sale and a transfer and conveyance thereof, and bring the same into this Court upon the judicial settlement of his accounts as such administrator to be disposed of pursuant to law.

(f) That the real property herein described of which the decedent died seized and possessed descended upon her death to her maternal first and second cousins as named in the petition in this proceeding, pursuant to the provisions of the Decedent Estate Law of the State of New York.

(g) That said administrator make a report to this Court of his proceedings under this order with all convenient speed.

That the real estate which the said administrator is hereby authorized and directed to sell and convey is described as follows, viz.:

(Here insert description.)

.....

Surrogate.

(File bond in accordance with order.)

FORM No. 331d.**Report of administrator.**

STATE OF NEW YORK.

SURROGATE'S COURT, County of.....

In the matter of the petition of..... for the
 mortgage, lease or sale of the real property of
, late of,
 County, New York, deceased, for the purpose of
 paying her debts and funeral expenses.

To the Surrogate's Court of the County of..... :

I,, administrator of the above-named deceased, do hereby make the following report of my proceedings as such administrator, under and pursuant to the directions contained in an order of this Court in these proceedings, dated....., 19...., and duly entered.

Before executing said order I filed in this Court a bond, in the penalty fixed by the order, to the people of the State of New York, with two sureties, conditioned for the faithful performance of the duties imposed upon me by said order, which bond was duly approved by the Surrogate.

After filing said bond I proceeded to execute said order by contracting to sell the real estate described in and directed by said order to be sold.

A written contract of sale has been made by me with the....., in which I have agreed to sell and it has agreed to purchase said real property for the sum of \$..... cash. Upon the execution of said contract the purchaser paid to me the sum of \$..... of the purchase price and therein agreed to pay the balance thereof when said contract shall have been confirmed by this Court and the deed delivered.

The property contracted to be sold consists of.....building and lot, having a frontage of about.....feet.

The contract referred to is filed with this report and made a part thereof.

Before making such sale I had interviews with several prospective buyers and advertised the sale of the property in the....., a newspaper published in the.....of....., and thereafter received several offers to purchase the property varying from \$.....to \$....., the latter amount being the highest offer received from any person and \$..... more than the estimated and appraised value of the premises.

It is my opinion that the price for which the said real property is contracted to be sold is the best price obtainable for the same.

The expenses and disbursements incurred and to be incurred by me and by my attorneys in connection with this proceeding for the sale of said real property are as follows:

Personal expenses:

- For car fare, notary's fees and publication,
- “ personal service of citation on creditors,
- “ publication of citation.

Expenses of attorneys:

- For telegrams,
- “ postage,
- “ personal service of citation on heirs,
- “ railroad fare from.....to,
- “ copy stenographer's minutes,
- “ documentary stamp to be used on deed,

Total, \$

I further report that there is due, owing and unpaid the following items affecting the premises sold and which are liens and charges against the same and necessary to be paid before a clear title can be given:

- Principal and interest on mortgage, \$
- Fire insurance,
- Village tax
- Water tax,
- Town and school taxes,
- Abstract of title,

Total \$

All of which is respectfully submitted.

Dated....., 19....

.....
Administrator.

STATE OF NEW YORK,
.....County, ss.:

....., being duly sworn, says that he is the administrator of the above-named deceased and the person who signed the foregoing report; that he has read said report and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this.....day
of, 19....

.....
Notary Public,

FORM No. 331e.**Agreement of sale.****AGREEMENT.**

This Agreement, made between....., as administrator of the estate of....., late of....., County of....., New York, deceased, hereinafter called the administrator, and....., of the..... of....., a domestic religious corporation, having its principal place of worship in said..... of....., hereinafter called the purchaser.

Whereas, by order of the Surrogate's Court of the County of....., dated the..... day of....., 19.., and duly entered in a proceeding for the mortgage, lease or sale of the real property of the said....., deceased, for the payment of (his or her) debts and funeral expenses, the said administrator was ordered and directed to sell the real property of the deceased described in the petition in said proceeding, and in said order, either at public or private sale, and if sold at private sale to make a written contract with the purchaser and report the same to said Surrogate's Court:

Now, this Agreement Witnesseth, that in consideration of the covenants and agreements herein mentioned, and the moneys paid and agreed to be paid, the parties hereto agree as follows:

The administrator agrees to sell and convey to the purchaser the real property hereinafter described for the sum of \$....., and the purchaser agrees to buy said real property and pay said administrator the sum of \$....., in cash as the purchase price thereof upon the delivery to it of an administrator's deed to said premises, after this agreement of sale shall have been confirmed by an order of said Surrogate's Court and the administrator ordered to make such conveyance; but if this agreement shall be rejected by said Surrogate's Court, then it is to be void and of no force or effect.

The purchaser agrees to pay the administrator the sum of \$....., upon the execution and delivery of this agreement, to be applied upon the purchase price of said premises, and further agrees to pay the balance of the purchase price upon the delivery of said deed.

The administrator agrees to return to the purchaser said sum of \$....., provided this agreement shall not be confirmed as aforesaid.

This agreement shall be binding upon the successors and assigns of the parties hereto.

The following is a description of said real property:

(Here insert description.)

In Witness Whereof, the administrator has hereunto set his hand and seal and the purchaser has caused this agreement to be executed by it.....,

and the seal of the corporation affixed hereto in duplicate this.....day
of....., 19....

.....
Administrator of the estate of.....

By.....

Its.....

(Acknowledgments.)

.....
Notary Public,

.....County, N. Y.

STATE OF NEW YORK,

.....County, ss.:

On this.....day of....., 19...., before me personally came
....., to me personally known, who, being by me duly sworn, did
depone and say, that he resided in the.....of....., and that he
was the.....of the....., the corporation described in and
which executed the foregoing instrument; that he knew the corporate seal
of said corporation and that the seal affixed to the foregoing instrument was
such corporate seal; that it was thereto affixed by the order of the.....
of said corporation, and that by like order he subscribed his name thereto
as.....

.....
Notary Public,

.....Co., N. Y.

FORM No. 331f.

Final order.

At a Surrogate's Court, held in and for the County of.....,
at the Court House, in the City of....., on the.....
day of....., 19....

Present: Hon....., Surrogate.

STATE OF NEW YORK.

SURROGATE'S COURT, County of.....

In the matter of the petition of....., for
the mortgage, lease or sale of the real property
of....., late of.....,
County, New York, deceased, for the purpose of
paying her debts and funeral expenses.

Upon reading and filing the report in this proceeding of....., adminis-
trator of the estate of the above-named deceased, verified the.....day of

....., 19...., from which it appears that the real property described in the order directing the sale thereof for the purpose of paying the debts, funeral expenses and charges against the deceased, has been contracted to be sold by said administrator to the....., for the sum of \$....., \$..... of the purchase price having been paid to the administrator upon the execution of said contract, which has been filed in this Court as a part of such report; and it appearing to the satisfaction of the Surrogate from said report and contract that the purchase price agreed to be paid for said real property is the fair and reasonable value thereof; and this matter having been duly adjourned from time to time to this day:

Now, on motion of....., attorneys for said administrator, no one opposing,

It is Ordered, Adjudged and Decreed, that said report and contract of sale of the real property ordered to be sold in this proceeding be and the same hereby is in all things confirmed.

It is further Ordered, Adjudged and Decreed, that the said administrator execute and deliver to the....., a deed of the real property described in said order of sale and contracted to be sold, upon the payment to him in cash of the balance of the purchase price remaining unpaid.

That out of the proceeds of sale so received and said administrator retain the sum of \$.....for his commission and the further sum of \$..... for his expenses in this proceeding, making in all \$.....; that he retain the further sum of \$.....for his attorneys and counsel herein and their expenses, which are hereby allowed.

It is further Ordered, Adjudged and Decreed, that said administrator pay from said proceeds of sale the sum of \$.....for the principal and interest due on the mortgage covering said premises, and insurance and taxes which are charges against the property sold, and that the balance of \$..... shall be retained by him and accounted for on his judicial settlement and to be disposed of in accordance with the decree made thereupon.

Witness, Hon....., Surrogate, and the seal of this Court the day and year first above written.

.....
Surrogate.

FORM No. 331g.

Mortgage of real estate to pay debts.

THIS INDENTURE.

Made the day of, one thousand nine hundred and twenty-five,

Between as executor of the Last Will and Testament of, late of, party of the first part, and, residing in, party of the second part, Witnesseth:

Whereas, such proceedings have been had and taken in the Surrogate's Court of Rensselaer County for the mortgage, lease or sale of the real estate of, late of, deceased, for the payment of her debts, funeral expenses and charges, that by an order of the said Surrogate's Court dated the day of, 1925, the said was duly authorized to mortgage the real property owned by said deceased at the time of her death for the purposes therein mentioned, the same being purposes set forth in section 234 of the Surrogate's Court Act and the said infants mentioned in said proceedings having been represented by, their special guardian, and all of the proceedings having been in conformity with the laws of the state of New York,

Now Therefore, by virtue of the authority in me vested by the said proceedings and the orders of the Surrogate's Court of Rensselaer County and in consideration of the sum of \$500 to me in hand paid the receipt whereof is hereby acknowledged, the party of the first part for securing the payment of the said sum of \$500 with interest thereon at the rate of 6% per annum from the day of, 1925, ten years from the date thereof, the interest thereon to be paid semi-annually, does hereby grant, release and mortgage unto the said party of the second part and to his heirs, (successors) and assigns forever.

(Insert description of property.)

Together with the appurtenances and all the estate and rights of the said and of the party of the first part, his heirs and assigns forever.

To have and to hold the above granted premises unto the said party of the second part, his heirs, administrators, executors or assigns the said sum as though this mortgage were made by said in h.... life time.

Provided always that if the said party of the first part as such executor or his successor or the devisees or their successors in interest under the Will of the said or their assigns shall pay unto the said party of the second part, his heirs, administrators, executors or assigns the said sum of money afore mentioned and the interest thereon at the time and in the manner mentioned herein, then these presents and the estate hereby granted shall cease, determine and be void.

Provided Further that if the said executor or devisees, their heirs, executors or assigns shall fail to pay any tax or assessment levied against said property when the same is due or payable or to keep the buildings on said premises insured against loss by fire for the benefit of the mortgagee, then the said party of the second part, his executors, administrators or assigns shall have the power to sell the said premises herein described according to law,

It Is Further Expressly Agreed that the whole of said principal sum shall become due at the option of the party of the second part, his executors, administrators or assigns after default in the payment of any interest due or said taxes, assessments or insurance or any part thereof for 60 days.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

In Presence of

..... L. S.
As executor of the Last Will and Testament of

(Add acknowledgment.)

FORM No. 332.

Issues framed for trial by jury..

I. Was the alleged last will and testament, bearing date....., duly executed by.....?

II. Did.....possess testamentary capacity at the time of the execution of the alleged last will and testament on the...day of....., 19...?

III. Was the execution of the alleged last will and testament procured by fraud or undue influence practiced upon the said.....?

FORM No. 333.

Designation by trust company of clerk of court to receive service of papers against trustee.

SURROGATE'S COURT, Rensselaer County.

In the matter of the probate of the last will and testament of....., deceased.

The Union National Bank of Troy, New York, having been appointed trustee of the trusts created in the last will and testament of....., deceased, by an order of the Surrogate's Court of the County of Rensselaer, pursuant to section 167 of the Surrogate's Court Act, as amended, hereby designates the clerk of said Surrogate's Court, or his successor in office, as a person on whom service of any process issuing from the Surrogate's Court may be made in like manner and with like effect as if it were served personally upon said trustee, whenever such trustee cannot be found and served within the State of New York, after due diligence used.

Dated Troy, N. Y., June 4th, 1924.

THE UNION NATIONAL BANK OF TROY, NEW YORK,

By.....

Its President.

Trustee of the trusts created in the last will and testament of....., deceased.

STATE OF NEW YORK,

Rensselaer County, ss.:

On this fourth day of June, 1924, before me personally came....., to me personally known, who, being by me duly sworn, did depose and say that he resided in the City of Troy, and that he was the president of The Union National Bank of Troy, New York, the corporation described in and which executed the foregoing instrument, that he knew the corporate seal of said corporation, that the seal affixed to the foregoing instrument was such corporate seal; that it was thereto affixed by order of the board of directors of said corporation, and that by like order he subscribed his name thereto as president.

.....
Notary Public,
Rens. Co., N. Y.

FORM No. 334.

Petition for adoption of infant under 12 years of age.

SURROGATE'S COURT, County of Monroe.

In the matter of the application for adoption of
....., an infant, under the age of twelve
years, by.....and....., his wife.

To the Surrogate of the County of Monroe:

The petition of.....and....., his wife, of the City of Rochester, County of Monroe and State of New York, respectfully shows:

First. That your petitioners are husband and wife and live together as such at number 307 McNaughton Street, in the City of Rochester, County of Monroe and State of New York.

Second. That....., the person whom your petitioners desire to adopt, as hereinafter stated, is of the age of about three months as your petitioners are informed and verily believe; that said.....resides with her mother.....at number 79½ North Street, in the City of Rochester, New York.

Third. That shortly before or after said infant was born....., father of said infant, abandoned said infant and its mother and has not since returned, as your petitioners are informed and verily believe.

Fourth. That said infant was born at the City of Rochester, New York, on the 30th day of April, 1924, as your petitioners are informed and verily believe.

Fifth. That the religious faith of the parents as your petitioners are informed and verily believe and of the foster parents of said child is the Roman Catholic faith.

Sixth. That said infant has at no time resided with said foster parents. That the mother of said infant has three other children besides the said, namely:, ten years of age;, eight years of age; and....., six years of age; that said mother depends upon her own earnings to support said child, and that unless said child is placed for adoption with some person, it will be necessary for said child to be placed in some free institution, as your petitioners are informed and believe.

Seventh. That your petitioners desire to adopt said.....and for said purpose have made and executed an instrument pursuant to the Domestic Relations Law of the State of New York, which is submitted herewith, and which is consented to by....., mother of said infant, as required by the Domestic Relations Law as appears by said instrument.

Eighth. That your petitioners have sufficient means to properly care for, support and educate said infant.

Ninth. That no application for an order as prayed for herein has been made to any other Court.

Tenth. That your petitioners therefore pray that an order may be made allowing said adoption pursuant to the statutes in such cases made and provided, and that said.....shall henceforth be regarded and treated as your petitioners' own lawful child and be accorded all the rights and privileges afforded by law and that she be given the name of..... and may after said adoption be known by that name.

Dated Rochester, N. Y., July 22nd, 1924.

.....

STATE OF NEW YORK.

County of Monroe,

City of Rochester, ss.:

.....and....., his wife, being duly sworn, depose and say that they are the petitioners named in the foregoing petition; that they have read the foregoing petition and know the contents thereof; that the same is true of their own knowledge, except as to the matters stated therein to be alleged upon information and belief, and that as to those matters they believe it to be true.

.....

Sworn to before me this.....

day of July, 1924.

.....

Surrogate.

Philip H. Donnelly,
 Attorney for petitioners,
 500 Aetna Building,
 Rochester, N. Y.

FORM No. 334a.**Agreement of adoption.**

SURROGATE'S COURT, County of Monroe.

In the matter of the application for adoption of
, an infant, under the age of twelve
 years, by.....and....., his wife.

AGREEMENT OF ADOPTION.

Whereas,and....., his wife, both being of full age and residing together as husband and wife at number 307 McNaughton Street, in the City of Rochester, County of Monroe and State of New York, desire to adopt as their own child....., a minor of the age of about three months, now residing with her mother.....at 79½ North Street, Rochester, N. Y.

Now therefore, the said..... and....., his wife, promise and agree to adopt the said.....as their own lawful child, and by this agreement do adopt the said....., and promise and agree to treat the said.....as their own lawful child in every respect whatsoever.

And the said....., mother of said infant, hereby consents to said adoption, and hereby renounces all right and claim upon said....., or upon her earnings or any other property or right of said..... which she may now own, possess or be entitled to receive at the present time, or which she may own, possess or be entitled to receive at any time in the future, including both equitable and legal rights and property and choses in action.

And the parties to this agreement severally pray that an order may be made allowing and confirming said adoption.

And said..... states that the said.....was born in the City of Rochester, New York, on the 30th day of April, 1924, and that said child and her parents are of the Roman Catholic faith.

It is further agreed that said.....shall after said adoption be known as.....

In Witness Whereof, the said.....and....., his wife, and said.....have hereunto subscribed their names and set their seals the 22nd day of July, 1924.

(Acknowledgment.)

.....

FORM No. 334b.**Order of reference.**

At a Surrogate's Court held in and for the County of
Monroe, at the Court House, in the City of Rochester,
N. Y., on the 22nd day of July, 1924.

SURROGATE'S COURT, County of Monroe.

In the matter of the application for adoption of
....., an infant, under the age of twelve
years, by.....and....., his wife.

A petition having been duly presented by..... and.....,
his wife, verified on the 22nd day of July, 1924, praying for an order allow-

ing and confirming the adoption by them of one....., an infant female
child, born at the City of Rochester, N. Y., on the 30th day of April, 1924,
and there having been duly presented to me at the same time an instrument
in writing wherein and whereby the said.....and....., his
wife, agree to adopt said.....and treat her in all respects as their
own child, and wherein and whereby....., the mother of said infant,
consents to said adoption and renounces all right to said child, and the said
.....and....., his wife, andhaving appeared be-
fore me and been examined by me to determine whether the moral and
temporal interests of said.....will be promoted by said adoption,
and the Domestic Relations Law as amended by Chapter 323 of the Laws
of 1924 requiring an investigation as to the truth of the allegations set
forth in the papers herein, it is hereby

Ordered, that the matter herein be referred to William C. Combs, Esq.,
attorney and counselor at law of Rochester, N. Y., to investigate and report
upon the allegations set forth in the papers in this proceeding and such
other facts relating to said child and to said foster parents as will give
the Court full knowledge as to the desirability of confirming said adoption,
and it is hereby further

Ordered, that the said William C. Combs, Esq., submit to this Court a
report containing the results of his investigation.

.....
Surrogate.

FORM No. 334c.**Report of referee.**

SURROGATE'S COURT, Monroe County.

<p>In the matter of the application for adoption of an infant under the age of twelve years by.....and....., his wife.</p>

To the Surrogate of the County of Monroe:

Pursuant to an order of this Court granted on the 22nd day of July, 1924, in the above-entitled matter, directing me to investigate and report upon the allegations set forth in the papers in this proceeding and such other facts relating to the child and foster parents as will give this Court full knowledge as to the desirability of confirming the adoption of said child, I do respectfully advise that I have made an investigation in accordance with said order, and that, as a result of said investigation, I do respectfully submit the following facts for this Court's consideration, which facts are to my best knowledge, information and belief, true:

I find the facts, circumstances and conditions, as set forth in the petition and other papers in this proceeding, to be truly and fairly stated; I further find that the petitioners,and....., were married nine (9) years ago and have been since that time living with the mother of said....., that they have resided for a period of nearly nine years at no. 307 McNaughton street in the City of Rochester, New York; that they now have one child, Marian Rose, an issue of said marriage, of the age of six years, who is living with them. The said.....has been steadily employed at Kodak Park for a period of nine years, and still is, and earns sufficient wages to properly care for his present family and the infant sought to be adopted by this proceeding; that he has no outstanding debts or obligations. That the said.....owns a small amount of real estate on Elizabeth street in the City of Rochester, New York. That the said petitioners were first informed of the infant in this proceeding by an "ad" in a Rochester newspaper; that thereafter, Rev....., a Roman Catholic Priest, informed them that the facts and circumstances as stated by the mother of said infant,, and as restated by them in the papers in this proceeding, were true.

I further find that....., the mother of said infant, is not employed at the present time, although able to do certain kinds of work, which she is now seeking; that her stepbrother contributes to her support and maintenance when necessary and that she has no other income except as above stated, although she expects to share, with her own brother, in her mother's estate when the same is settled; that her mother died when she,, was three years of age but that she has received no moneys or property whatever from said estate although her mother owned, or had an interest in,

certain property in the city of Utica and, upon information and belief, in the State of Massachusetts.

By reason of all the above I am of the opinion that the adoption petitioned for would be for the best interests of the infant and further that, although the period of residence of the said infant with the foster parents is less than six months, to date, the facts relating to the circumstances of the mother of said infant necessitate the adoption at the present time.

Dated. Rochester, New York, July 23rd, 1924.

WM. C. COMBS.

FORM No. 334d.

Order confirming adoption.

At a Surrogate's Court, held in and for the County of Monroe, at the Court House, in the City of Rochester, N. Y., on the 30th day of July, 1924.

Present: Hon. Selden S. Brown, Surrogate.

SURROGATE'S COURT, Monroe County.

In the matter of the application for adoption of
an infant, under the age of twelve
 years, byand....., his wife.

A petition having been duly presented by.....and....., his wife, verified on the 22nd day of July, 1924, praying for an order allowing and confirming the adoption by them of one, an infant female child, born at the City of Rochester, N. Y., on the 30th day of April, 1924, and there having been duly presented to me at the same time an instrument in writing wherein and whereby the said.....and....., his wife, agree to adopt said.....and treat her in all respects as their own child, and wherein and whereby, the mother of said infant, consents to said adoption and renounces all right to said child, and the saidand....., his wife, and.....having appeared before me and been examined by me to determine whether the moral and temporal interests of said.....will be promoted by said adoption, and an investigation as required by the Domestic Relations Law, as amended by chapter 323 of the Laws of 1924, having been ordered, pursuant to said statute, and said investigation having been made by William C. Combs, Esq., attorney and counselor at law, of Rochester, N. Y., to determine the truth of the allegations set forth in the papers presented in this proceeding and as

to such other facts relating to said child and as to said foster parents and the desirability of confirming said adoption, and a written report containing the results of said investigation having, pursuant to statute, been submitted to me, wherein and whereby it appears that the mother of said infant is living separate and apart from her husband and is the only support of four small children and that she has been abandoned by her husband, and wherein and whereby it appears that it is necessary that said child be adopted by some suitable person, or by some institution, and that said.....and....., his wife, are suitable persons; and it appearing that the said.....has not resided with said foster parents for a period of six months, as provided by statute, but that it will be for the best interests of said child that it be immediately adopted by said foster parents, and that it is necessary that said adoption take place at once without waiting for the six months period, provided by statute, to run; and being satisfied that the moral and temporal interests of said.....will be promoted thereby, it is hereby

Ordered, that the said adoption be allowed and confirmed, and henceforth the said.....shall be regarded and treated in all respects as the child of said.....and....., his wife, and the said.....shall hereafter be known under the name of.....

.....
Surrogate.

FORM No. 335.

SURROGATE'S COURT—Rensselaer County.

In the matter of the petition of.....
and....., as executrices of the last will
and testament of....., deceased, for
a determination as to the construction or effect
of the disposition of property contained in the
last will and testament

of

....., late of the town of Hoosick,
Rensselaer County, New York, deceased.

To the Surrogate's Court of the County of Rensselaer:

The petition of and, executrices of the Last Will and Testament of the above named deceased, respectfully shows to the Court:—

First. That they are the executrices of the Last Will and Testament of said deceased, duly appointed by a Decree of the Surrogate's Court of the County of Rensselaer, dated June 12, 1923.

Second. That the said died in said County of Rensselaer leaving a Last Will and Testament which was duly probated in the Surrogate's Court of said County on June 12th, 1923, and duly recorded therein; that Letters Testamentary under said Will were granted to your petitioners, who qualified and are now acting as such executors.

Third. That the said died seized and possessed of real property of the value of approximately \$6,000, and personal property of the inventory value of \$5,826.49.

Fourth. The only persons interested in this proceeding, and under the terms and provisions of the Last Will and Testament of said are as follows:

Name	Age	Address
.....
.....
.....

That the above named is an infant of years of age having no general guardian and who resides with his mother,

That there are no other persons than those mentioned interested in this proceeding.

Fifth. For the purpose of determining whether your petitioners, as executrices of the Will of said deceased, have the power under said Will to sell and convey the real property which the deceased owned at the time of his death, under an implied power of sale, in order to work an equitable conversion of the realty into personalty and so that the provisions of said Will may be carried out according to the testator's intention, your petitioners desire a judicial determination as to the construction or effect of the following provisions of said Will.

(Insert extract from Will.)

Wherefore, your petitioners pray that a citation to show cause issue out of this Court to all persons interested in the said Will, citing and requiring them to show cause in this Court on a day to be fixed by the Court, why a decree should not be made construing said Will and judicially determining that it was the intention of the testator by his said Will to cause an equitable conversion of his real property into personalty and for that purpose there is an implied power of sale given the executors thereof, and that said executors have the right to sell said real property and to give a good and sufficient title thereto; or such other determination as to the Court may seem just and proper in the premises.

That no other application has been made for the relief herein asked for.
Dated Troy, N. Y., February 16th, 1924.

Petitioner.

STATE OF NEW YORK,
Washington County, ss.:

....., being duly sworn, says that she is one of the petitioners named in the foregoing petition by her subscribed; that she has read said petition and knows the contents thereof and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters she believes it to be true.

Sworn to before me this 16th day
of February, 1924.

Notary Public.

FORM No. 335a.

THE PEOPLE OF THE STATE OF NEW YORK.

To:

Upon the petition of, executrices of the Last Will and Testament of, deceased, who resides at

You are hereby cited to show cause before the Surrogate's Court of the County of Rensselaer, at the Court House in the City of Troy, New York, on the 21st day of March, 1924, at ten o'clock in the forenoon of that day, why a decree should not be granted construing the Last Will and Testament of said deceased and judicially determining that it was the intention of the testator by said will to cause an equitable conversion of his real property into personalty and that for that purpose there is an implied power of sale given to the executrices thereof, and that said executrices have a right to sell said real property and to give a good and sufficient title thereto, or such a determination as to the Court may seem just and proper in the premises.

In Testimony Whereof, we have caused the seal of our said Surrogate's Court to be hereunto affixed.

L. S.

Witness: Hon. Chester G. Wager, Surrogate of said County,
at the City of Troy, this 3rd day of March, 1924.

LUCIEN E. CLICKNER.

Clerk of Surrogate's Court.

FORM No. 335b.

At a Surrogate's Court held in and for the County of Rensselaer
at the Court House in the City of Troy, New York, on the
14th day of April, 1924.

Present: Hon., Surrogate.

SURROGATE'S COURT—Rensselaer County.

In the matter of the petition of and
....., as executrices of the Last Will
and Testament of, deceased, for a
determination as to the construction and effect
of the disposition of property contained in the
Last Will and Testament

of

....., late of the town of Hoosiek, Rensselaer County, New York, deceased.

The petition of and, executrices of the Last Will and Testament of the above named deceased, which Will was duly probated and recorded in this Court, verified the 16th day of February, 1924, praying for a judicial determination by this Court as to the construction and effect of the Third, Fourth and Fifth clauses or paragraphs of said Will, having been heretofore and on the 3rd day of March, 1924, filed in this Court, and a citation thereupon duly issued to all persons interested under said Will requiring them to show cause in this Court on the 21st day of March, 1924, why the determination and construction prayed for in said petition should not be made and said citation having been returned with proof of the due service thereof upon all persons named therein, and said petitioners having appeared in this proceeding by Heaton & Mambert, Esqs., their attorneys; and it appearing that, a person interested under said Will is an infant over the age of fourteen years,, upon filing his written consent thereto was duly appointed special guardian of said infant to attend to his interest in this matter and he appeared personally for that purpose and opposed the petitioners' application; and said proceeding having been adjourned from time to time to this day—

Now, After Hearing Heaton & Mambert, Esqs., in favor of the determination and construction prayed for in said petition, and, Esq., for the infant in opposition thereto; and after hearing the proofs and allegations of the parties and due deliberation had and on motion of Heaton & Mambert, Esqs.,—

It is Ordered, Adjudged, Decreed and Determined, "that the true construction and effect of the items or paragraphs of the Last Will and Testament of, deceased, numbered 'Thirdly,' 'Fourthly' and 'Fifthly,' is that it was the intention of said testator by said provisions to cause an equitable conversion of his real property into personalty and for that purpose, and for the purpose of carrying out the terms and provisions of said Will, there is an implied power of sale given the executrices thereof and that said executrices have the power and lawful right to sell and convey said real property and to give good and sufficient conveyances thereof."

It is Further Ordered, Adjudged and Decreed, that said executors pay to, the special guardian for said infant, the sum of \$75.00 for his costs in this proceeding, which is hereby allowed. That they pay to Heaton and Mambert, Esqs., the sum of \$125.00 for their costs and disbursements in this proceeding, which is hereby allowed.

Witness: Hon., and the seal of the Surrogate's Court the day and year first above written.

.....
Surrogate.

INDEX.

A.

Abandoned child:	Page
defined	18
Abatement:	
legacy for support.....	167
Account:	
administrator of property of absconding persons.....	211
citation for settlement.....	212
filing on application for release of surety.....	126
inserting expenses of administration.....	217
intermediate for information and for settlement.....	212
legatee, over paid.....	217
liability of sureties for fraud of co-representative.....	217
more complete ordered.....	12
trial of with jury.....	32, 213
Accumulation:	
merging income with principal.....	196
stock dividends	196
Ademption:	
legacies	166
Administration:	
alien nonresident.....	73
ancillary, transmitting assets.....	122
citing nonresidents	74
c. t. a., appointed when.....	75, 77
c. t. a., assignee of whole estate.....	78
c. t. a., no distinction on account of sex.....	78
c. t. a., rights, powers and duties.....	159
effect of divorce.....	72
excluding persons having prior right.....	77
granted to whom.....	70
guardian appointed.....	72
no distinction as to sex.....	71
public administrator	73
temporary, whether adm. c. t. a. should be appointed.....	75

Adoption:	Page
abandoned child	18
abrogation	22, 23
charitable institutions	21
consent	18
evidence of abandonment.....	18
investigation	20
natural children of either spouse.....	17
order and effect.....	20
property rights	229
same religious faith.....	21
several sections amended.....	16
voluntary	19
 After-born child:	
not cited	4
 Appeal:	
effect on parties not appealing.....	138
motion to direct not necessary.....	139
order in transfer tax proceeding.....	138
 Appearance:	
notice, form and effect.....	30
 Asset:	
goodwill may be.....	214
 Attorney:	
appeal from order fixing fees.....	16
fees may be apportioned.....	15
fixing compensation	14
 Attorney-general:	
not cited	28
 Authentication:	
certificate, contents.....	26
exemplification of will.....	66
 B.	
 Banks and trust companies:	
acting in fiduciary capacity.....	117
foreign may receive appointment.....	118
 Bond:	
filing by surrogate.....	3
guardian, penalty reduced.....	114
reduction of penalty by proceeding.....	127

Burial:	Page
control of burial and monument.....	139
perpetual care of cemetery lots.....	197
soldiers, sailors and marines.....	140
trusts to cemetery for care of lot outside certain cities.....	198

C.

Citation:	
account where next of kin paid.....	213
after-born child	4
ancillary letters to state tax commission.....	122
attorney-general need not be cited.....	28
contents where number is large.....	27
for administration.....	74
known creditors more than fifty.....	29
legal papers publishing in first department.....	30
service on infant.....	29
service within the state.....	28
service without state or by publication.....	30
settlement of account.....	212

Clerks:	
fees and expenses.....	7
New York county, fees and expenses.....	8
surrogate's court.....	5

Codicil:	
republished will	45
revoking	42

Commissions:	
allowed under law in force.....	134
assignability	134
computing value of estate on gross value of \$100,000.....	135
deceased representative	134
proceeds of business.....	133
rate of increased.....	130
unsold real estate.....	133

Compromise:	
issues in will contest.....	152

Consolidation:	
proceedings for probate—different wills.....	32

Construction of will:	
application of trustee in bankruptcy.....	212
before end of life tenancy.....	211

Construction of will—Continued.	Page
class ascertained as of what time.....	172
conversion and intention.....	149
investments directed by will.....	201
judicial settlement	211
“or his heirs”.....	176
selling investments made by testator.....	206
Contempt:	
serving certified copy of decree.....	35
Costs:	
additional allowance	136
adult parties	136
allowance should be based on affidavits.....	136
appeal, construction by court.....	137
depending on final decree.....	137
fixed in making decree.....	135
probate, proponent a legatee.....	136
Custody:	
of property	12
D.	
Death:	
presumption	13
presumption, date of.....	13
presumption, in partition.....	13
proof of, letters issued not prima facie.....	13
Debt or claim:	
action on.....	153
additional services under general hiring.....	221
administration expenses, proceeding for payment.....	158
alimony	156
allowance and contest on judicial settlement.....	151
bad faith in allowing or paying.....	151
contingent claim.....	150
deficiency judgment in foreclosure.....	155
duty to discover.....	149
establishing	151
funeral expenses	157
jury trial when rejected.....	153
liability of heir to pay.....	187
notes or checks as debts.....	225
on judgment, statute of limitations.....	155
paid, or allowed and not paid.....	223
proof of claim for services.....	224

Debt or claim—Continued.	Page
publishing notice to creditors.....	150
representative against deceased.....	219
submission to representative.....	153
under bond and mortgage.....	151
withdrawing on judicial settlement.....	154
Decree:	
opening	4
probate, effect of out of state.....	14
probate, force and effect.....	35
probate, opening	4
probate, surrogate must be satisfied.....	57
serving certified copy	35
Definitions:	
amendments	231
Deposition:	
witness without the state.....	51
Depository:	
of securities under order of court.....	125
Descent:	
child born alive.....	194
comes on part of father or mother, definitions.....	194, 195
general rules	193, 194
inheritance by parents.....	193
no distinction of sex.....	193
Devise and bequests:	
abatement	166, 167
absolute, cut down.....	173
ademption	166
after gift to individual or corporation.....	168
carries other property, when.....	165
charitable, gift to one to be paid to another when formed.....	198
charitable purposes.....	168
computing life estate as to one-half estate.....	170
corporation merged or dissolved.....	177
effect of words like "heirs," "to have and to hold".....	174
eo nomine	171
foreign money	180
further disposition of void or lapsed legacy.....	176
implied trust	195
income from bank deposits.....	183
in lieu of dower	190
interest on legacies	181

Devise and bequests—Continued.	Page
interest on legacy payable in future.....	182
jointly or in common.....	185
more than one-half estate.....	169
next of kin	171
not in employ, lapse.....	177
offsetting debt	181
payment	181
right to occupy house or room.....	183
secret trusts	167
substitutionary	176
taxes on annuities.....	180
to executors for care of cemetery lots.....	196
vested contingent remainder.....	185
vesting	178
vesting, time for payment postponed.....	178
widow rejecting legacy, reimbursement of devisee.....	190
Discovery proceeding:	
burden of proof.....	146
when gift claimed.....	146
compelling payment for property withheld.....	143
decree where payment is directed.....	144
determined when	145
effect of answer	145
guardian may present petition	143
jurisdiction	142
payment for or delivery of property withheld.....	10, 12
trial or examination	144
trial with jury	143
Distribution:	
between 1898 and 1905	227
either spouse divorced.....	228
proceeding to compel payment	158
to child after dissolution of marriage	228
Divorce:	
residence of infant affected by.....	111
Dower:	
estates by entirety	189
in fee absolute	189
dissolution of marriage	189, 190
proceeds sale	164
E.	
Equitable powers:	12

Estates tax:	Page
provisions establishing on estates exceeding one million dollars..	101, 109
Evidence:	
ancient wills	64
competency of witnesses	222
competency of witness, claim paid or allowed	223
court records as to sanity	56
declarations	56
declarations in other wills	158
extrinsic in construction	61
interested party releasing interest	55
prima facie, allegations in papers	13
undue influence	56
Examination:	
before trial	5
Executor:	
all should join in creating obligation	141
appointing substitute	67
F.	
Fees:	
appraiser, referee, juror and witness	128
collecting rents	131, 132
effect of decree under former rates	132
executor, administrator, guardian or trustee	130
printers	129
Findings:	
not necessary	138
Foreign executor or administrator:	
defined	124
may be brought into action	125
may sue or be sued	123, 124
G.	
Gift:	
per capita	187
when need not be testamentary	36
Good will:	
asset of a profitable business	214
Guardian:	
appointed as administrator	72

H.

Husband and wife:	Page
property in joint names	215

I.

Indians:

administrator of estates of	69
Onondagas "dead feast"	227
proof of authority of representative to sue or be sued.....	123

Infant:

allowance for support	184
allowing parent for past support	218
associate guardian estate over \$5,000	113
conditional decree of guardianship	113
effect of divorce on domicile	112
guardian's annual account in certain counties.....	115
guardian by will or deed	114
guardian in socage	209
guardian of same religious faith	113
may not lawfully do	209
payment of share including proceeds of action	230
proceeds of action for personal injuries	231
property not to be mingled	210
removal of guardian	120
residence or domicile	110
sojourning in the county.....	112
support of, from property of absconding parent.....	209

Insurance:

group	148
(fire) collected by representative as trustee	141
(life) assets when	147
change of beneficiary	145
industrial	144

Issues:

framing for trial	32
-------------------------	----

J.

Joint property:

assets when	147
deposit in trust for another	219
husband and wife	215
savings bank deposits	220
use of "or" "and"	216

Judge:	Page
practicing law	1
Judicial settlement:	
equitable powers	12
Jurisdiction:	
compensation of attorney	14
concurrent of Supreme and Surrogate's courts	109
construction of will	60
contracts and mutual wills	158
discovery proceedings	142
equitable powers	12
fact of partnership	148
general	10
order more complete account	12
representative removed or resigned	128
residence of infant in county	111
state, over property there	14
Jury:	
fees of jurors and officers.....	33
New York county, special.....	34
obtained how	33
panel in supreme or county court.....	33
Jury trial:	
accounting proceeding	31, 213
closing argument	55
constitutional right	213
demand for	52
determining right to	31
directing verdict	33, 55
entitled to	32
framing issues	32
Kings county	1
none on application for share of unknown person	230
not entitled to	31
probate of heirship	193
submitting issues	55

K.

Kings county:	
jury trial	1

L.

Letters:	Page
ancillary, granted to foreign representative	121
filing designation of clerk on whom to serve process	116
improvidence defined	116
not prima facie proof of death	116
objections to grant of	117
proof of authority	13

Life tenant and remainderman:

allotment of dividends	208
apportionment of interest and dividends	191
apportionment of proceeds on sale of unproductive property	192
apportionment of royalties for publication	191
death of one of three	198
lessee from	175
ownership of stock dividends designated	208
title not dependent on probate.....	184

M.

Marriage:

civil contract	24
common law	23
dissolution	25
dower when dissolved	189, 190
presumption of legitimacy.....	26
presumption of validity	118
void and voidable	24, 25

Mortgage, lease or sale of real property for payment of debts and charges:

effect of partition pending	163
for distribution	165
interest of people of the state	162
limitation of time	163
payment into court	164
petition	163
real property, when and how	161, 162

Motion:

defined	26
succeeding surrogate may decide	5

N.

Negligence:

payment for personal injuries to infant	231
prosecuting action for	218
settlement of action	218

New trial:	Page
granting	4
New York county:	
fees and expenses of clerk	8
New York city taxes payable from personal estate	154
special jury	34
Notice:	
appearance, form and effect	30
contest of probate	53, 54
to creditors, publishing	150
P.	
Papers and books:	
filing by surrogate	3
Partition:	
effect of, on sale to pay debts	163
payment to parties	164
presumption of death and birth of issue	13
Partnership:	
dividends to creditors	148
good will as an asset	214
jurisdiction to determine fact of	148
Party:	
person served with notice of contested probate	5
Petition:	
prima facie evidence	13
probate	48
Pleading:	
motion is not	26
Power:	
appointment by will	174
distributive, under	173
in trust	195
to grant new trial	4
to open decree	4
Power of sale:	
right of administrator c. t. a. to execute	159

Presumption:	Page
conflicting	26
Probate:	
abandoning contest and enforcing compromise agreement	153
compromise of issues by proceeding	152
consolidation of proceedings as to different wills	32
costs fixed by decree	135
decree, force and effect	35
decree not effective as to out of state property	14
demand for trial with jury	52
dispensing with testimony of absent or deceased witness	50
effect of alterations	59
effect of, on will which violates contract	59
examination before trial	5
illiterate testator, proof of knowledge	57
lost or destroyed will	52
name of testator written by him in attestation clause	57
notice of contest to legatees and devisees	53
objections in case of divorce or separation	53
party, person served with notice of contest	5
proof, knowledge of contents	57
proponent to produce witnesses	54
release of interest for purpose of testifying	55
right to statutory	58
striking out objections or answer	54
submitting issues	55
surrogate must be satisfied	57
testimony of witness dead or absent	50, 51
title of life tenant not dependent on	184
unrevoked will	60
who may petition	48
who may file objections	53
will, citizen of Great Britian	47
will on file out of state	49
will written in shorthand	58
witness and proof	49
witness failing to remember	58
Probate of heirship:	
jury trial	193
proof of	192
Provisions:	
applicable	231
Public administrator:	
entitled over divorced husband	73, 75

R.

Removal:	Page
executor or trustee	119
guardian of nonresident infant	120
not depositing funds in separate account	120, 121
trustee cannot be suspended	119

Revocation:

by later will	43
codicil to will	42
duplicate will	44
later invalid will	43
marriage	44
mutual or reciprocal will	41
presumption and evidence	52
writing on original will	43

S.

Service:

certified copy decree	35
citation on infant	29
citation within the state	28
creditors more than fifty	29
without the state or by publication	30

Soldiers, sailors and marines:

burial fund increased	140
-----------------------------	-----

Special county judge:

compensation when acting as surrogate	2
---	---

Stenographers:

appointment	6
fees	10

Stock:

location of	14
-------------------	----

Sureties:

liability for fraudulent acts	217
reduction of penalty of bond	127
release of, by proceeding	126

Surrogate:

acting, compensation	2
clerks	5
fees and expenses	7

Surrogate—Continued.	Page
filing papers, books and bonds	3
motion made before former surrogate.....	5
practicing law	1
T.	
Taxes:	
payable from personal estate	154
Temporary administrator:	
power to lease real property	160
Tenancy by curtesy:	
defined	188
seized in possession	188
Tenancy by entirety:	
divorce severs tenancy	187
dower in	189
interest may be mortgaged or sold	186
land sold and mortgage taken back	161
tenants in common of rents.....	186
Testamentary:	
paper, character of	36
Testimony:	
record of dispensing with on probate	51
subscribing witness and physician, preserving	46
Transfer tax:	
amendments as to taxing residents	81
annuities	88
appeal from pro forma order	138
bond may be given where highest rate has been assessed.....	83
contemplation of death.....	87
contingent remainders	89
district attorney may collect tax	91
dower in estates by entirety.....	87
estates by entirety	221
estate of nonresident after July 1, 1925	94
estates of nonresidents prior to July 1, 1925	93
exemptions for education and charity	82
exemptions and rates under previous statutes	88
joint tenants	82, 86
jurisdiction to make order	79
liability of certain corporations	79

Transfer tax—Continued.

	Page
nonresidents, in effect July 1, 1925	94-101
order not controlling on other questions than tax.....	78
proceedings by appraiser	83
receipts for taxes	92
tenancy by entirety	82, 86

Trial:

claim of representative against deceased	219
counterclaim, debt due from representative	128
when executor or administrator party	128

Trust and trustee:

appointed when	77
arriving at certain age.....	199
bond under foreign will	67
care cemetery lots	196
care cemetery lots outside of certain cities	198
certificate designating clerk to receive service	68
concurrence by all	141
investment of funds	202, 205
investment in certain stocks	204
lease of property	200, 201
order for sale of	200
order to pay income not assignment	199
personal discretion	69
power of alienation	198
power of sale after death of beneficiary	200
reaching income for benefit of spouse.....	207
required to file designation of clerk to receive process	116
selling investments made by testator	206, 207
setting apart funds	207
successor appointed how	68
terminates on death of	69

V.

Verdict:

directing	33, 55
-----------------	--------

Vouchers:

returned or destroyed	3
-----------------------------	---

W.

Will:

after-born child provided for	225
age eighteen in both sexes	37
conditional and contingent	36
construction, ambiguous will	62
effect of word "surviving"	62

Will—Continued.	Page
extrinsic evidence	61
intention of testator	61
special proceeding	60
contract violated by	59
deposit for safe keeping	45
duplicate	44
effect of alteration	59
executed without the state	46
exemplification of	66
holographic without witnesses, proof	46
lost or destroyed, probate	52
mutual and reciprocal	41
non-English speaking witness	40
nuncupative	41
obtaining from safe deposit box	45
order of signing by testator and witnesses	40
preserving testimony of subscribing witness and physician	46
publication by testator	39
recording and retaining, foreign wills excepted	63
recording foreign, authentication of papers	65
proceeding for	64
to perfect title	64
republishing by codicil	44
retaining on file	63
revoking	41, 44
signing at the end	38
signing in or after attestation clause	39
subscribing or attesting witnesses	39
subscription by mark	37
who may make	37
words of inheritance not necessary	63
written in shorthand	58
 Witnesses:	
attesting to will	39, 40
deposition without the state	51
examination on probate	49
probate, order for examination before trial	54
record dispensing with testimony of deceased witness	50
 Words and phrases construed:	
authorize and empower	232
heirs	232
may and must	232
or and and	232
relatives	232
widow	232

